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Examples of defensive construction are many. The clearest of these examples are cases where individuals within some social group want to preserve a certain status associated with membership in that group. Consider three relatively obvious examples, each closer to home than the examples of change described above.

1. Gays in the military.

There is a picture of the "military man"--a stereotype, no doubt, but extant nonetheless--as the holder of "unambiguously male" virtues (not unambiguous virtues, but unambiguously male virtues)--strong, disciplined, emotionless, and (crucially) heterosexual. For those who hold this picture, membership in the military offers a certain status. For them, to associate with the military is to gain the value, however defined, of these qualities, much like one acquires a certain status from membership in a particular fraternity--the jock, or quasi-jock, for example who seeks the value of association with the jock fraternity. For those who join the military in part to gain their perceived value of this association, there is a strong interest in preserving the image that the military presents. For them, part of the value in belonging to this military depends upon the preservation of this image.

Homosexuality is perceived to be inconsistent with this image. Again, the point is about perception. No doubt the perception is the result of a particularly skewed stereotype that homosexuals are effeminate, or weak, or irresolute, n168 but for social
[*988] meaning, the truth or falsity of the stereotype does not matter. To the extent that this stereotype exists, those in the military who gain by the nonhomosexual image of the military have an interest in avoiding open acceptance of homosexuals into the military. n169

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n168 Compare Silvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis L Rev 187.

n169 Paul Kahn makes a related point in Love Field: Patriotism vs. Eros; Military Gay Ban, New Republic 19 (Mar 8, 1993) (discussing the perceived threat that love between members of the armed forces poses).

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This does not mean, however, that the military has an interest in excluding homosexuals completely. For of course, gays have long served extremely well in the military. Instead, what is ideal from the military's perspective is to have homosexuals serve in the military--and thereby gain the value of their service--while also having them serve invisibly in the military--and thereby not lose the dominant image of the military man as the holder of these "unambiguously male" virtues. From the military's perspective, it is best if it can gain the value of homosexual service without suffering the cost of the loss in "status" that many in the military seek. n170 Thus, the logic in a "don't ask, don't tell" policy.

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n170 For a detailed analysis of this very point, see David Cole and William N. Eskridge, From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct, 29 Harv CR-CL L Rev 319, 332 (1994).

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If the formal exclusion of gays in the military were lifted, however, this image of the military man would change. Although again driven by a misleading stereotype of homosexuality, the social meaning of being a homosexual is simply not the same as the social meaning of the "unambiguous male." Because of this difference, opening the ranks of the military to homosexuals would ambiguate the social meaning of membership in the military, as well as ambiguate the meaning of being gay for those who hold this stereotypical view. If openly open to all males, the military could not preserve the image of being constituted exclusively by the unambiguous male.

No doubt many would say of this change, all for the better. But my point is that those who would welcome the change are not likely to be those in the military itself. For many in the military may have joined the military precisely because of the social meaning that this exclusion preserves. For them, allowing openly homosexual servicemen would be to lose a dimension of value that they have purposely sought. Hence the need for these sorts to insist upon the exclusion or at least the image of an exclusion.
[*989] For these sorts, to give up the exclusion would be to give up some of what they perceive to be the value of associating with the military. For them, exclusion is a way to defend the social meaning of being a military man.

2. Motherhood and abortion.

In the eyes of many, the strongest justification for the right to abortion is equality--that the right is essential to the full and equal participation of women in the professional world. n171 Viewed in this way, the right to abortion associates with the notion that it is appropriate for women to occupy professional roles.

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n171 See the discussion in Cass R. Sunstein, The Partial Constitution 272-85 (Harvard 1993).

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Because of this association between abortion rights and women's professional roles, however, women who have invested themselves in roles that associate female virtue with domestic life generally, and motherhood in particular, may oppose the abortion right. n172 As the "professional" model for women becomes secure, it challenges the appropriateness of those who have selected a more traditional life. n173 Their choice--to stay at home and raise children--becomes something to be justified, rather than the natural role of a woman. And to the extent it becomes something to be justified, it imposes a burden on those who are within this more traditional role. When the "natural" thing for a woman to do was stay at home, the social meaning costs of adopting this domestic life were small. But when neither "nature" nor law compels a life at home, and when the life at home is challenged as grounded in inequality, or sexism, or weakness, the choice to stay at home becomes a choice. And when a choice, it

is a choice that invites social stigma. Even worse for these women would be the world where the norm shifted from an ambiguous meaning associated with staying at home, to a meaning that was unambiguously negative. To avoid both, therefore, some may oppose the abortion right to assure it does not deny them a certain peace with their own lives.

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n172 The discussion in this section draws upon Kristin Luker, Abortion and the Politics of Motherhood (California, 1984).

n173 I mean this point only as a description. There is no necessity that this be the reading, here, as elsewhere.

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Of course the choice to be a stay-at-home mother does not necessarily have this stigma of inequality. Were the choice per- [*990] fectly free (whatever that would mean), then there would in principle be no difference between the choice to be a stay-at-home mother, or lawyer, or construction worker. Motherhood takes on this ambiguous meaning only because, until recently, this "choice" did not exist for most women or existed only at a very high price. Some therefore want to avoid the ambiguity by reducing the extent to which women have this choice at all by, for example, opposing the abortion right.

When one opposes the abortion right because it affects the social meaning and value of a certain form of life, then one is engaging in what I have called a defensive construction: one acts to preserve an existing social meaning by fighting changes that may undermine that meaning. Here, the meaning is the natural virtue or value of motherhood, challenged by a universal abortion right.

3. Antimiscegenation laws. n174

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n174 For a related look at the subject, see Andrew Koppelman's Note, The Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98 Yale L J 145 (1988).

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As many have noted, much of the impetus for the Jim Crow laws in the Reconstruction South was the desire of whites to preserve the social status of "whiteness." n175 Under the social system of the antebellum South, such laws were not needed. The system of slavery did enough to construct the social difference between the races.

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n175 See id at 181 (discussing the social status implications of miscegenation and sodomy laws).

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Once slavery was formally ended, however, those who wanted to preserve the status of whites against the advancing status of blacks had to turn to other techniques. The Ku Klux Klan was one such technique, designed to terrorize blacks against taking actions that would advance them socially. A second technique was Jim Crow, which also used force--here the force of the state--to keep blacks in an inferior social position relative to whites.

A third technique was the technique of antimiscegenation laws. Although formally equal--they denied whites the opportunity to marry blacks just as they denied blacks the opportunity to marry whites--the laws were unequal in effect. They were designed to entrench social differences by maintaining the "purity" of the white race. Such segregation made it easier to maintain racial loyalties. If the races intermarried, it would be more diffi- [*991] cult to insist upon the superiority of the "white" race, most obviously because it would become more and more difficult to separate out a white from a black race. n176

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n176 Dorothy Roberts, The Genetic Tie, 62 U Chi L Rev 209, 223-30 (1995).

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Not that intermarriage would erase racial hatred totally. The war in the former Yugoslavia is a nice testament to the nonplasticity of ethnic hatred. Nor would it be impossible to develop a code for separating white from black. Homer Plessy, for example, pleaded with the court that he was in fact white, since seven-eighths white, but the court in recognition of the evolving systems of segregation considered seven-eighths not white enough. n177 Nonetheless, increased intermarriage would tend to lessen the will to segregate, by lessening the "natural" distinction between white and black.

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n177 See Plessy v Ferguson, 163 US 537, 538 (1896).

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Antimiscegenation laws, then, can be seen as a tool for preserving a certain social meaning associated with being white. They preserve this meaning by protecting and perpetuating the perceived "purity" of the white race. And by maintaining that purity, the laws helped whites preserve a social meaning difference from blacks.

All three examples of defensive construction function in the same way. A social meaning is challenged by an emerging practice, and to preserve the old meaning, the emerging practice is prohibited or opposed. This resistance is a kind of social meaning construction because it aims to resist what would otherwise be an evolving social meaning. It "changes" the social meaning because but for its intervention, the meaning would become something else. Thus, "military men" resist the ambiguation of that term to preserve the value of the old meaning; stay-at-home mothers resist abortion rights to preserve the nature in their status as mothers; whites resist intermarriage to preserve the loyalty and sensibility of "whiteness." In each case, the semiotic content of a certain status is defended against changes that would change that semiotic content. This defense is as much construction as the offensive measures previously

discussed.

III. Models of Construction

The discussion so far has proceeded in three steps. First, I sketched a range of what I termed social meanings, at least some the products of a world of social structures that are contingently
[*992] and humanly constructed. Second, I described how these social meanings can be used by social agents to advance individual or collective ends: how they become, that is, tools in social regulation. Finally, I offered examples of these meanings changing, both offensively and defensively, on an individual, social, and political level.

The next step is to find a way to model these changes in social meaning. To do this, we need a way to connect these collective meanings to the actions of individuals. To understand how they get made, and changed, we must understand how they get made and changed in the heads of individuals.

The tools for this understanding are many. Anthropology and sociology most obviously describe this process of change. n178 But what is missing from their accounts is an easy way to link the process of this change to the actions of individuals. My commitment throughout is to a methodological individualism; the question is what tools are necessary to satisfy this commitment. Pierre Bourdieu, too, is a methodological individualist. His is an extraordinarily rich account of the structures of incentives confronting any individual when negotiating, and transforming, what Bourdieu calls the "linguistic market." n179 But explicating Bourdieu is beyond the scope of this essay. n180 What we need instead is a much simpler set of tools to capture something of the link between individual action and social meaning.

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n178 Within this literature, the best account I have come across describing the ambiguity and multiplicity in this meaning construction is the work of Jean and John Comaroff. See Jean Comaroff, Body of Power, Spirit of Resistance: The Culture and History of a South African People (Chicago, 1985); Comaroff and Comaroff, Of Revelation and Revolution (cited in note 141). For other useful accounts, see Connerton, How Societies Remember at 93 (cited in note 35) (describing the constructive force of habit); Steven Lukes, Political Ritual and Social Integration, 9 Sociology 289 (1975) (describing the construction through ritual); Kertzner, Ritual, Politics and Power (cited in note 19) (same). What is best about this literature is the multiplicity of meaning that it emphasizes, and the ways in which even dominated meanings continue to effect social meaning construction. See, for example, James C. Scott, Domination and the Arts of Resistance: Hidden Transcripts (Yale, 1990).

n179 Bourdieu, Language and Symbolic Power at 66 (cited in note 42).

n180 Or so the editors tell me. What even the briefest review of Bourdieu's work will reveal, however, is that his is the richest source for understanding and describing these processes of change and reconstruction. In a fuller theoretical account, moreover, Bourdieu's use of economics as a metaphor for social meaning management would provide an obvious link to the simple economic model that follows. Nonetheless, it is clear (or has been made clear) that

this is a link that must be worked out elsewhere. The interested reader could begin the review with Bourdieu, Language and Symbolic Power (cited in note 42).

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Economics will provide this relatively simple set of tools. For economics has a simple way to describe the nature of social meaning, and social meaning change, and thus a simple way to model how it is that such meanings can change.

Social meaning changes when context is changed. But context is not changed by decree. Since contexts are constituted by the taken-for-granted understandings and expectations of groups of individuals, somehow, through habit or ritual, these individuals must be made to replace these old understandings and expectations with new ones, and these new ones must become taken for granted. But more importantly, since contexts are constituted by the taken-for-granted understandings and expectations of a group of individuals, these new understandings and expectations must be taken for granted by a group at the same time.

Thus does social meaning construction present a problem of collective action. n181 Social meanings are constituted by contexts of understanding; they are reconstructed when contexts of understanding change; but contexts change when collections of individuals change, and hence the problem of social meaning making is how to get these groups to change.

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n181 Though not a simple collective action problem. As I discuss below, some of these collective actions raise exceptionally difficult questions of responsibility.

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In what follows, then, I will argue that we should understand social meaning, and its transformation, as a kind of collective or social good; that as with all collective goods, there is a problem in assuring the good's supply. This problem is loosely referred to as a prisoner's dilemma problem, but better, as a collective action problem. It follows from this that in any case where some individual or part of the collective wants to transform a social meaning, that individual or part faces a collective action problem, since it must succeed in inducing a collective response from a sufficiently large portion of the total society to assure the social meaning change. Against this background, many of the mechanisms that exist for preserving and changing social meanings--the mechanisms of social construction--will be understood as devices for resolving these collective action problems.

A. The Problems of Collective Action

The following tale is told of a small village in middle Europe sometime during the Middle Ages: This village had an annual festival, at which wine and food was to be consumed. So as to
[*994] collect enough wine for the festival, a large covered vat was placed in the center of the village, and each member of the village was to pour a pitcher of white wine into the vat. These villagers were not wealthy, and wine was not

cheap. And as each villager thought the matter through, each realized the following dilemma: While everyone will no doubt pour something into the vat, it is not clear whether they will pour wine or water. It is not clear, because each observes, "either everyone else in the village will pour pure wine into the vat, or not. Some might pour water instead of wine." Each villager reasoned:

If everyone else does pour wine into the vat, then I could pour water into the vat without anyone noticing, and without diluting the festival wine significantly. If everyone else is not pouring wine in the vat, then my single pitcher is not going to save the watered down festival wine. Therefore, regardless of what everyone else is doing, it makes no sense for me to pour wine.

Thus, few villagers poured wine into the vat, with the result that the festival drink was mainly water.

The story is a version of the classic collective action problem. And while one could quibble with details in the story, its lesson is too simple for any quibble. The purity of the wine in the vat is a collective good; as described, the collection system for that wine cannot assure that purity; it cannot assure the purity since there is nothing to match individual consumption with individual contribution to the supply of what is consumed. Thus the good (pure wine) presents a relatively difficult problem of assuring its own supply. n182

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n182 It is common to associate this "problem of supply" with certain kinds of goods. Public goods, for example, are the most common examples of goods that do not "naturally" assure their own supply. Because a public good is "nonrival and indivisible" it is quite difficult to assure that individuals adequately contribute. For a discussion of private goods, see Tom Tietenberg, Environmental and Natural Resources Economics 45 (Harper Collins, 3d ed 1992). A lighthouse presents the classic example. Since one person's consumption does not reduce the amount that another could consume--hence it is nonrivalrous--and the lighthouse cannot divide its good and send it to subscribers only--hence indivisible--any individual can truly reason, "I hurt no one by consuming the benefit of this lighthouse without contributing to its supply. Like Locke's state of nature, I can consume what I will, while leaving 'as much and as good' for everyone else to consume." See John Locke, The Second Treatise of Government 33 (Liberal Arts, 1952) (Thomas P. Peardon, ed). But see R.H. Coase, The Lighthouse in Economics, 17 J L & Econ 357 (1974).

But it is an interesting mistake to think that this problem of supply is a problem limited to certain kinds of goods--as if there is an ordering, with public goods the most difficult to supply, private goods the most simple, and club goods somewhere in between. See, for example, James M. Buchanan, An Economic Theory of Clubs, 32 Economica 1, 1314 (1965). It is a mistake because, as Ronald Coase pointed out long ago, every good presents a problem of supply, whether private or public. The problem exists whenever one cannot assure that those who consume the good will pay for its supply, and for any good, there is

always a context within which it is not possible to assure that those who consume are so contributing. The problem of supply exists no less when laws against theft are not enforced than when lighthouses are built.

Economists focus on pure public goods when thinking about the collective action problem, but this is because they take for granted a certain regime of property and contract rights. But contract and property systems are no less solutions to this problem of supply of private goods than a tax on passing ships would be a solution to the problem of supply of public goods. Every good presents a problem of supply; what distinguishes each is simply the ease with which this problem can be solved.

Rather than engaging in a categorical debate over kinds of goods, we should focus on the general question of what steps are needed to solve particular problems of supply, and compare the relative costs of each solution.

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Consider three possible solutions to the village's problem of supply.

Solution 1: Inspection. Imagine an inspector tested each villager's contribution before it was poured into the vat. Everyone would know then that only wine was being poured into the vat, and the wine at the festival would be pure. Individuals would still have an incentive to pour water--since water is still cheaper--but the inspector would stop any individual from acting on that incentive. The inspector would assure the provision of a public good.

Solution 2: Shock. Imagine a device, inserted into the stomach of every villager, that generated a shock of pain whenever the villager did what a villager was not supposed to do. Now when the villager contemplated pouring water instead of wine, she would account not only for the monetary savings from substituting water for wine, but also for the pain that she would suffer for pouring water rather than wine. At some point--some amount of pain--it would no longer be in the individual's interest to substitute water for wine. Pouring water would now have a cost that exceeded the cost of the wine, and the individually rational act would be to pour wine.

Solution 3: Guilt. Rather than an external device planted in the villagers' bodies, imagine that we could use a natural device to deter the villagers. Imagine, that is, that the villagers could be made to feel guilty about pouring water instead of wine. n183 Imagine that people understood the action to be "cheating" or
[*996] "disloyal" or "selfish" or "dishonest", and that when they did something that was "cheating" or "disloyal" or "selfish" or "dishonest" they actually felt badly. Imagine they felt as badly as they would if the device I mentioned above were placed in their stomach and set off. If the village could succeed in constructing such meanings, then the village could succeed in securing a supply of wine rather than water, by changing, in just the way the pain device above changed, the individual incentives of members of the village. n184 Given the feeling of pain associated with being a "cheater" or the like, it would no longer be rational for the individual to refuse to pour wine into the village vat. n185

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n183 Frank extends this to the case where an individual not only feels a certain way about defecting from social behavior, but reveals that feeling through some subtle physical signal, for example, a blush. See Robert H. Frank, Passions Within Reason: The Strategic Role of the Emotions 64 (Norton, 1988).

n184 See id at 53 ("[One's] aversion to feelings of guilt effectively alters the payoffs she faces.").

n185 As I suggest below, my purpose in sketching this case is not to suggest "morality" reduces to such an account. My aim here is not to develop a general account of morality. A similar point about moral sentiments is made by Adam Smith, and Robert Frank draws upon this to suggest that these moral sentiments--"anger, contempt, disgust, . . . guilt"--"help people solve the commitment problem." Id.

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All three solutions present a common pattern. n186 There is a social end, and deviation from supporting that end is individually sanctioned. No doubt the sanctions are different, some more expensive than others, but so long as the sanction to an individual is greater than the benefit from defecting from a particular social end, we can expect individuals to support the social end. And finally, if the social benefit is greater than the cost of the sanction, then there is reason for society to erect such a sanction.

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n186 The pattern is also quite simplified from traditional social psychology. For a much richer division of influences, see Elliot Aronson, The Social Animal 34 (California, 1995) (describing three kinds of responses to social influence: compliance, identification, and internalization). Guilt in my scheme most closely approximates internalization in his.

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All three solutions can be called, following Mancur Olson, selective incentives. A selective incentive is any incentive "that applies selectively to the individuals depending on whether they do or do not contribute to the provision of the collective good." n187 In each case, the selective incentive functions to raise the cost of noncompliance sufficiently so as to make it rational to contribute to the good's supply, whether the selective incentive is the sanction of detection (the inspector above) or a certain kind of penalty (pain or guilt) for failing to contribute to the good's supply. n188 So again, if the cost of wine in our village is $ 3 a pitcher, and the villager would be willing to pay $ 5 to avoid the pain of guilt, or $ 6 to avoid the pain of the internal shock, then it would be ratio- [*997] nal for her to pour wine rather than water--both the physical pain and the guilt function as selective incentives to assure her cooperation.

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n187 Mancur Olson, The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities 21 (Yale, 1982).

n188 With a private good, the selective incentive is denial of the good if not paid for.

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This long digression should suggest three related points. First, "guilt" in the example above is a social meaning. It also ties, in an important way, to the incentive of an individual. In this way, social meanings can and often do function as selective incentives. An individual's action has a meaning, for example, "cheating," and in a well-functioning community, cheating induces a certain kind of pain in individuals that often (but not always) suffices to remove the incentive to cheat. Should--not necessarily would, and certainly not in all cases. But that such an effect is even possible is only because (1) social meanings construct a certain semiotic content to an individual act that make it possible for them to be "cheating" or "disloyal" and because (2) individuals internalize these norms and feel this semiotic content. It is because being a cheater, or being disloyal, can actually matter subjectively to the choices that an individual makes that social meanings become relevant--and at times central--to the regulation of individual behavior. n189

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n189 My perspective here is focused on why devices like social meanings can serve social ends and suffice to induce individuals to act in accordance with those ends. For an exceptionally rich account of why individuals might find that some social norms--honesty, or generosity, or altruism, for example--may be constitutive of rationality, see Frank, Passions Within Reason at 68-69 (cited in note 183).

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Thus, the first conclusion drawn is that social meanings can function as selective incentives to induce action according to a social norm, or to achieve a collective good. The second conclusion is that these meanings, themselves designed to solve collective action problems, do themselves present collective action problems in their own construction. The selective incentives that morality constructs solve collective action problems, but they get constructed themselves only be solving collective action problems. And when constructed, they get changed only by solving collective action problems. n190

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n190 Changed not only by solving collective action problems. Other influences can create these changes.

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A third conclusion is even more important for the problem of how social meanings change: The very same influences that induce an action according to a social norm also induce resistance to efforts to change a social norm. The selective incentives that go with the preservation of social meanings simultaneously inhibit the social meanings' transformation. Thus an individual not only
[*998] has no selective incentive to change a social meaning, but she also suffers a selective cost if she does act to change it.

Take an obvious and trivial example--seatbelts in taxis in Budapest, as described above. n191 As stipulated, putting on a seatbelt in a taxi in Budapest had a certain meaning--an insult to the driver. To insult someone is, for the properly (or sadly, depending upon your perspective) socialized sort, costly. One feels something of the pain one imposes on the other. One feels this pain even if one believes the norm stupid. That is, even if I believed the norm stupid, and believed it would be better for both me and the driver if the norm were different, and even if I wanted to change the norm, by donning my belt and explaining my reasons, I would feel (socialized coward that I am) the insult that I had delivered to the driver. I would feel it, and hence it would be a cost. My decision to undertake the reform, then, would be rational only if the expected benefit from the change would outweigh the pain I feel at insulting the driver. But what would the benefit to me be? In this case, I get little from changing the norm, but suffer a lot.

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n191 See text accompanying note 22.

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Social meanings act to induce actions in accordance with social norms, and thereby impose costs on efforts to transform social norms. They present, then, a particularly harsh collective action problem, for not only is there little incentive for an individual to contribute to a new collective good, but there is a punishment--the cost of deviance--for any individual who wishes to contribute to a new collective good; that is, to a new social meaning. Deviance is an extremely significant individual cost for reasons analogous to Robert Frank's account of the self interest in being moral. n192 Slight but repeated deviations from some social norms may wholly undermine an individual's credibility. Deviance from social norms, when aggregated, signals a more fundamental individual disorder. n193

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n192 See, for example, Frank, Passions Within Reason at 68 (cited in note 183) (discussing how a self-interested person might prefer to act morally).

n193 It is this point about the social costs of deviance that I believe theorists such as Mark Ramseyer give us too little account of. See, for example, J. Mark Ramseyer and Minoru Nakazato, The Rational Litigant: Settlement Amounts and Verdict Rates in Japan, 18 J Legal Stud 263, 287 (1989). By focusing on the marginal person, the person on the margin of society who feels least the pressure of its social norms, Ramseyer argues that "the presence of these outsiders . . . can corrode the entire normative order." Id. But there is a big step taken here. If one is an outsider, and one's actions are deviations from the norms, then one's credibility is undermined as a social actor. This cost of deviance thus both inhibits deviation and undermines the significance of any particular deviation. I agree that there is value to seeing whether we can understand social behavior without accounting for such norms--this, it seems to me, is the great value of Ramseyer's work. But we have seen enough to know that such an account is in important contexts incomplete. See, for example, Robert C. Ellickson, Order without Law: How Neighbors Settle Disputes (Harvard, 1991).

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[*999]

In this way do social meanings bring along with themselves the very mechanisms necessary to preserve their dominance. These mechanisms are themselves social meanings. Or again, social meanings use social meanings to solve collective action problems. And since social meanings are collective goods, to resist the mechanisms that force conformance requires the solution to a collective action problem. Thus the trap that individuals face when wanting to transform particular social meanings: To act against social meanings not only provides little individual reward, but it also brings with it individual sanction, and at some extreme, a form of rhetorical self-immolation.

From this perspective, then, we see that defensive construction may often be easier than offensive construction. In defending a social meaning, structures of social stigma are already built in, while in attacking a social meaning, one must both overcome the existing structures of social stigma and implement new structures in line with one's desired meaning. This is not to say that defensive construction will always succeed, or that offensive will always fail, but that defensive construction does not face as severe a collective action problem as does offensive construction.

I do not mean to overstate the case. Sometimes social meanings collapse on their own; sometimes they are transformed by other social action; sometimes they are so weak that a single action by a single person is enough to topple them; sometimes the efforts that topple them are small and repeated, or small and well placed--the technique, say, of jujitsu. But regardless of how much effort is needed to change, what is important is locating where the change must occur--in individuals, acting on the basis of social meanings.

One final and important caveat: I also do not mean to suggest that the account I have offered is an understanding or proof of morality. Morality is more than a response to incentives. My argument here is not about the nature or function or emergence of morality; it is about the use of devices to align the different structures of incentives that may induce people to act. Morality is an incentive to act in a particular way, but it does not follow that "all there is to morality" is a structure of self-interested incen- [*1000] tives as justification. My purpose is not to reduce morality to this structure, but instead to identify how some can be brought to act according to social norms through an internalization of these norms.

1. Whether to change social meanings.

My aim in this Section so far has been to emphasize the collective action in social meanings. Auguste Comte makes a similar point about language. As he put it,

> Language forms a kind of wealth, which all can make use of at once without causing any diminution of the store, and which thus admits a complete community of enjoyment; for all, freely participating in the general treasure, unconsciously aid in its preservation. n194

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n194 See Bourdieu, Language and Symbolic Power at 43 (cited in note 42), quoting Auguste Comte, 2 System of Positive Polity 213 (Longmans, Green, 1875).

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Constructed social reality is, I have suggested, also such wealth. In Bourdieu's language, it is one aspect of inherited social capital. But most importantly, construction, like language, is "a collective enterprise." n195 Social meanings are "collective identities" and collective identities are "an emergent feature of collective action." n196 An individual may use or participate in this constructed reality, but as with language itself, she may also have "virtually no control over [this reality]. Speaking individuals cannot determine the signs they use. These signs are fixed by the society within very strict limits." n197 To change these social meanings therefore requires a collective effort, which in turn requires the construction of an array of selective incentives, sufficient to overcome the selective incentives that act to support the status quo structure of social meaning. n198

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n195 Bourdieu, 7 Sociological Theory at 19 (cited in note 19).

n196 Schlesinger, Media, State and Nation at 181 (cited in note 113).

n197 Jeffrey C. Alexander, Analytic Debates: Understanding the Relative Autonomy of Culture, in Jeffrey C. Alexander and Steven Seidman, eds, Culture and Society: Contemporary Debates 1, 8 (Cambridge, 1990).

n198 This is not to say that the colleective entity being changed is something other than dispositions or attitudes in individuals. Again, for my purposes, ontology is not as important; it is only important to insist that nothing commits me to some sort of collective entity as the basis of a social meaning.

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Individuals, then, cannot be expected to act against social meanings, even if the social meanings are, from some perspective, stupid. The reason follows from what has been said so far:

[*1001] Social meanings are part of the benefits and costs associated with any individual action. They are, since collectively constituted, fixed, for a particular action at a particular time. Thus, given a particular constellation of meaning, an action can be, for an individual, rational, even if it appears, for a collective, irrational.

Consider a simplified example to help make this point more plain, one practice of Hindu widowhood. n199 According to Hindu tradition, when a woman is widowed, she "begins to wear coarse white saris, ceases to eat nonvegetarian food, and generally leads a frugal and secluded life." n200 This, for the widow, is an extraordinarily difficult existence, and one might well ask why women continue it. Some continue it because they believe it will lead to

compensation in the next life. n201 But, as Kaushik Basu and others describe, "most widows comply because of social sanctions and fear of ostracism." n202 To defect from the tradition would be costly, and if it is rational to conform, the defection must be more costly than compliance itself. Thus could this social action be rational in purely individualistic terms. n203

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n199 Actually, widowhood is treated very differently in the different castes. See Marty Chen, A Matter of Survival: Women's Right to Work in Rural India and Bangladesh (Harvard, forthcoming 1995) (discussing the different treatments of widowhood in Hindu culture).

n200 Kaushik Basu, Eric Jones, and Ekkehart Schlicht, The Growth and Decay of Custom: The Role of the New Institutional Economics in Economic History, 24 Explorations in Econ Hist 1, 10 (1987).

n201 Id.

n202 Id.

n203 Compare George A. Akerlof, An Economic Theorist's Book of Tales: Essays That Entertain the Consequences of Assumptions in Economic Theory 34-44 (Cambridge, 1984) (exploring economic incentives resulting from caste systems).

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But even if the action, given the norm, was rational, one might wonder whether the norm itself was rational. One might think, that is, that the norm should not demand such sacrifice from widowed women. n204

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n204 I don't want to argue whether it is or isn't inferior. I have my prejudices that it is inferior, but I leave it to others who know the culture better. See Basu, Jones, and Schlicht, 24 Explorations in Econ Hist at 18 (cited in note 200) (noting Hindu widowhood as an example of customs that linger even if they would not be chosen now).

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How could we know whether a social norm is collectively irrational? How could we say that despite it being rational for an individual to conform, it is irrational for a collective to induce such conformance?

Whether a society should work to change a particular social meaning requires a normative judgment. I do not intend to provide that normative judgment here, but we can describe norms
[*1002] for testing whether a social norm should be changed. The norms divide into two kinds, efficiency norms and distributional norms. In the balance of this Section, I describe these norms, and then turn, in Section 2 below, to how such changes may be effected.

Efficiency Norms. Efficiency norms--norms that test a social change by the standards of efficiency--could be of two sorts. We could imagine first a

requirement that social meaning be regulated if and only if such regulation would result in a pareto superior social state. Here's one example. I sketched what was the social meaning of wearing a seatbelt in a Budapest taxi, and argued that it would be better if that social meaning would change. It would be "better" in the sense of pareto superior so long as at least one person were better off, and none worse off. Does this condition hold in this case? There are two groups, drivers and passengers. Certainly we could say that passengers would be better off--removing the stigma of wearing a seatbelt would allow them the choice of wearing it or not, which would increase their well-being.

Whether drivers would be better off requires a bit more careful analysis. Before the social meaning changes, drivers are no doubt not better off, since they are insulted by their passengers' wearing seatbelts. But after the social meaning changes, they are, by definition, no longer insulted. Thus, after the change, seatbelt wearing makes them no worse off, and indeed, if there is a well-functioning insurance market, they should be better off. Thus from the perspective after the social meaning has changed, changing the social meaning of seatbelt wearing is a pareto superior change.

A less demanding efficiency norm for changing social meanings would be Kaldor-Hicks efficiency. Here what is required is not that all be either indifferent or better off, but that those who are better off are better off by enough to compensate those who are worse off for the harm the change causes them. Here again, Budapest may help. Even if one were not fully convinced that the remnants of machismo could be eliminated by changing the social meaning to allow seatbelt wearing, such that drivers were in some sense still worse off, one could well believe that the benefit to the passengers clearly outweighed the drivers' loss. Perhaps drivers would lament the passage of those glorious days when they could speed through tiny eighteenth-century alleys, with them and their passengers sitting on the edge of death. Nevertheless, it is not a wholly unreasonable judgment that that loss is small against the gain wearing seatbelts would produce.
[*1003]

Whether pareto or Kaldor-Hicks, however, the structure of both norms is the same. In both cases, the claim is that total wealth (however measured) is increased by the change in social meaning.

But note an important and latent incoherence in the very notion of applying these norms to changes in social meaning. For when we begin to tinker with social norms or social meanings, we also begin to undermine the perspective from which one can really choose whether he or she is "better off " in the changed world over the unchanged world. For if a large part of who someone is is the sum of these constructions of social meanings--the set of practices or understandings that guide and constitute her--then this act of changing social meanings is an act of changing the individual herself. And if an act of changing an individual, what is the coherence in the claim that "the individual" is better off with the change than without it.

An extreme example would make the point. Imagine a simple pill existed for erasing racism in a racist's character. Could we convince a racist to take the pill? Certainly, we could argue, that after taking the pill, the racist will be happy that he took the pill; we might even say that the racist would be happier overall after taking the pill than before. But even if both conditions were true, it is not incoherent to imagine the racist saying that he just doesn't

want to become a nonracist. That he, for example, would not be himself if he were forced to become a racist.

The example reveals something of what is presupposed by ordinary discussions of efficiency norms, or for that matter, of the distributional norms discussed just below. If it is unproblematic to assume that it is the same person choosing one world over the other, then notions like pareto efficiency, or Kaldor-Hicks efficiency, are untroubling. But if we imagine that the change contemplated actually changes the individual who would be making the choice, then there is an important incoherence in saying that the individual would choose such a world, or would be better off in such a world. For again, who is this individual who would so choose?

Resolving these questions is fundamental, but beyond the scope of this Article. In my view, they will have no simple resolution. For purposes of this Article, I will assume that the identity of individuals does not change as these constructions proceed, and hence, that it is coherent to speak of it being "efficient" to change certain meanings. This assumption is particularly strong [*1004] when I describe changing social meaning as simply the solution of a collective action problem.

Distribution Norms. A second norm for testing changes in social meaning tests not the efficiency of a particular change, but its distributional effect. We change a social norm, that is, because of whom the change benefits, and at whose expense. Here Bourdieu's notion of social capital is most useful.

By capital, we ordinarily mean assets which have a certain power within an economic system. Money, in this sense, is capital. The economist usually means something slightly different. For the economist, capital is an asset that produces something of value. n205 Bourdieu's use of "social capital" is consistent with both senses of the term. For him, social capital is a habit, or facility, or status, that yields a certain value to the holder. Being white in the antebellum South was a kind of social capital; having the ability to speak grammatically is a kind of social capital; having graduated from a prestigious university is a kind of social capital. In each case, social capital refers to something an individual has that gives the individual a certain value (whether positive or negative: having an English accent is social capital; its value can be positive or negative) in a particular social context.

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n205 Harold S. Sloan and Arnold J. Zurcher, Dictionary of Economics 60 (Barnes & Noble, 5th ed 1970).

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Imagine a society--this should not be difficult--where social capital is unevenly distributed according to gender, and women have less than men. Not that every woman has less social capital than every man, but that the distributions are such that the mean social capital is lower for women than for men. Some of this difference may be due to differences in, say, education, or tied, for example, to physical characteristics of the gender. But some no doubt are differences due merely to social meanings associated with being a woman. As I have described it, such would mean that the social meaning of being a woman in this society is more costly than the social meaning of being a man, since

again, capital makes existence easier, and capital is allocated in my hypothetical society on the basis of gender.

Against this background, a society could well decide it wanted to reallocate this social capital. Some of this reallocation may occur through ordinary means--by increasing the educational opportunities to women, for example. But some may come through changing the social meaning associated with being a woman--changing, for example, meanings tied to traditional [*1005] gender roles, or inequality. n206 Putting to one side the question of just how, we can see the justification for such change does not lie in efficiency: it would take a stretch to argue that men in this society are actually better off without their dominance than with it, although I do not want to argue that such a stretch could not be made. But assuming the stretch could not be made, it would remain for these reformers to argue for the change on equality, rather than efficiency, grounds. Social meaning must change, the argument would go, to effect a reallocation of social capital, so that women are not handicapped in social life by these structures socially constructed. Social capital is such a structure, and anything the state can do to restructure it advances this social goal of equality.

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n206 This is, in my view, the best reading of John Rawls's point about the "morally arbitrary" nature of personal assets. See John Rawls, A Theory of Justice 310 (Harvard, 1971). This reading was suggested to me by Alex Whiting.

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Efficiency norms, then, are distinct from distributional norms, though of course they overlap. Some changes may be justified on both efficiency and distributional grounds, but this is not necessarily so. Some changes will satisfy one norm, and not the other; and the choice of which to advance in any particular context will again require a political judgment.

So much about whether a social meaning should be changed. Think again about why they won't change on their own: While most economists operate with an assumption that preferences and institutions (read: norms) are fixed, n207 a developing literature known as "new institutional economics" addresses directly [*1006] how these norms develop. n208 In the terminology of the discourse, new institutional economics "endogenizes" institutions within its economic models--that is, as the neoclassical economist attempts to explain price, or quantity demanded, the new institutional economist attempts to explain norms, or institutions, and their evolution. n209 For even if an institution arises in response to demands of efficiency, it does not follow that the institution survives if and only if it continues to advance efficiency. "At a particular time in a particular economy, there may exist lots of institutions which serve no social purpose and which, though once valuable to society, may now be actually harmful." n210

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n207 Not because economists are so silly as to actually believe that they are fixed, but because most of the techniques of economics, like any system of knowledge, function only when certain structures are taken for granted. Usually this discussion is in the context of the evolution of custom, but a custom is

no less valuable for our purposes than a direct discussion of social meaning: Custom is just a particular form of social meaning, less symbolic in general, but generated and transformed by the same mechanisms that affect social meaning. Economists aim to understand both custom's origin and its persistence, and it is in tracking this understanding of a custom's persistence that the most useful parallels to the regulation of social meaning can be drawn.

There is nothing about positing a change in preferences, however, that is inconsistent with even Gary Becker's conceptions of the stability of preferences. As he has explained, what his account presumes is the stability of "metapreferences," not particular preferences.

> The message . . . is not that preferences at time t for different people depend on the same way on their consumption at t. Rather it is that common rules determine the way different variables and experiences enter the meta preferences that motivate most people at most times.
>
> Gary S. Becker, Habits, Addictions, and Traditions 23 (Center for the Study of the Economy and the State, 1991) (working paper series no 71).

n208 See Basu, Jones, and Schlicht, 24 Explorations in Econ Hist at 9 (cited in note 200). For the same point as applied to individual preferences, see Kenneth G. DauSchmidt, An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, 1990 Duke L J 1, 5.

n209 See Basu, Jones, and Schlicht, 24 Explorations in Econ Hist at 2 (cited in note 200) (describing approach of "new institutional economics").

n210 Id at 11.

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It is easy to see why unequal norms--norms that violate principles of equality--might survive. But why would inefficient institutions, as norms, survive? n211 In the neoclassical model of efficiency yielding from perfect competition, inefficiencies die away because individuals can select away from them. But competition crucially hangs upon choice, and individuals do not choose the institutions under which the rest of their choices are made. As Basu puts it, "individuals choose in the marketplace, in shops, in labor markets. They do not choose between institutions, customs and social norms. These evolve in response to a multitude of individual decisions spread over different domains and large stretches of time." n212

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n211 This question is related to the question why castes would survive. For an extraordinary account, see Akerlof, An Economic Theorist's Book of Tales at 36-37 (cited in note 203).

n212 Basu, Jones, and Schlicht, 24 Explorations in Econ Hist at 9 (cited in note 200). Another aspect of their survival may be a phenomenon of "path

dependence." See Bernard S. Black and John C. Coffee, Jr., Hail Britannia?: Institutional Investor Behavior under Limited Regulation, 92 Mich L Rev 1997, 2000, 2082-84 (1994).

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Thus, in many cases, since there is no clear individual mechanism to erode them, if institutions that have become inefficient are to die, often they must be changed. But again the norm or institution itself is a collective good--everyone can rely on it if anyone can--and as with any collective good, it will rarely be in the interest of any individual to act to change an inefficient institution. Often, moreover, there will be no collective entity that can [*1007] act to change it for the collective as a whole. Thus the inefficient institution is stuck, till shaken free from this equilibrium.

We can illustrate this point again with the example of Hindu widowhood. A Hindu woman does not enter the world, passing through John Rawls's veil of ignorance, n213 and select the world she will be born into. Instead, she is born into a world already rich with institutions and norms that constitute and constrain her character. In this world, she suffers the norm regarding Hindu widows--she experiences the social coercion that induces her to behave as a "proper Hindu woman" would. n214

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n213 Rawls, A Theory of Justice at 12 (cited in note 206) (defining the concept of "veil of ignorance").

n214 The pressure is rarely just social. See Chen, A Matter of Survival (cited in note 199).

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Imagine we believe this norm no longer efficient. For this norm to change, however, the individuals living under it must solve a collective action problem. Individuals may be able to resist the norm, or protest the norm, or defy the norm, but for the norm to change the collective must act together to effect reform. Without this coordinated action, "everyone may be worse off under [the system, yet] rational individuals may comply with its norms because they do not want to risk ostracism. In other words, once institutions are established, they may persist even though they are collectively suboptimal." n215

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n215 Paul J. DiMaggio and Walter W. Powell, Introduction, in Walter W. Powell and Paul J. DiMaggio, eds, The New Institutionalism in Organizational Analysis 1, 4 (Chicago, 1994). See also Basu, Jones, and Schlicht, 24 Explorations in Econ Hist at 10 (cited in note 200). Even if everyone were not worse off, under some conceptions of efficiency, for example, a Kaldor-Hicks conception, the change could still be rational. See text accompanying notes 204-05.

Note again, however, that there is a strong assumption in the notion that changing these norms could make everyone better off. For to make that assumption true in its simplest form, one has to imagine that changing the norms does not actually change the individuals acting under the norm. But in extreme cases,

this is a hard assumption to make. And if one thinks that the change does actually change the individuals in the society, then it is unclear what it means to say "everyone is better off."

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What we have said about institutions, customs, and social norms applies just as well to the general class of these particulars--social meaning. Social meaning is sustained by norms and custom; it can function as an institution; and it disciplines those within society to obey its demands. Social meanings can also become inefficient, but few mechanisms exist for transforming them. Often they can be changed only by some intervention that acts to shock the stable system of norms out of tilt. n216

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n216 Again, how to evaluate these notions of change is not easy. Traditional neoclassical economics as well may be unable to digest such an approach without trouble, however. If we understand the change I have been speaking of as a change in individual preferences, then this draws into doubt the ordinary norms for evaluating "efficiency." These norms typically presume stability of preferences in order to establish a baseline from which to compare changes. See Dau-Schmidt, 1990 Duke L J at 16 (cited in note 208).

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[*1008]

2. Tools for changing social meanings.

Social meaning changes; sometimes it is possible to effect or avoid such changes; efficiency and distribution norms would be appealed to to justify these changes. But we have yet to speak generally about the techniques for achieving or avoiding such change, not about how these techniques are solutions to collective action problems.

Drawing on the examples that began this Article, I now want to identify four methods of self-conscious transformations or preservations of social meaning and suggest how each act as solutions to a collective action problem. While three of these techniques will be quite familiar, the fourth may be something of a surprise.

All four are in some sense concerned with the same problem. All four, that is, are about how links in associations are made and broken, such that texts have or no longer have associated meanings. But we can divide this common problem into techniques of two kinds. One kind changes meaning directly, by interfering with existing meanings (these I call semiotic techniques); the other changes meanings indirectly by inducing certain behavior that, over time, will affect these meanings (these I call behavioral techniques).

In describing these techniques, I will rely on a (perhaps chilling) image of a meaning manager, or meaning architect, who has identified a social meaning that is to be transformed, and must find the techniques to achieve this transformation. Again, while chilling when imagined of government, as will be obvious, changes of just this sort are imagined and engaged by nongovernmental

actors all the time.

The changes that these techniques will remark are, in most cases, marginal. They are not the stuff of revolution; they are incrementalism, and reform. This does not mean that there is not revolution, or that social meanings cannot be revolutionized. I do not mean that all there is is incrementalism and reform, because again, I do not mean this to be a complete catalog of techniques for social reform.

Finally, the reason the meaning manager selects these changes is left unspecified. I am not arguing these changes are
[*1009] selected because they make society better off. This is not meant as a functionalist account. All I am aiming for here is an account of the techniques used in such changes.

a) Semiotic techniques. Two techniques for changing social meaning rely directly upon the semiotic content of the meaning being changed. Both, that is, use social meaning to change social meaning, one by focusing and the other by blurring a particular social meaning.

The first and most obvious example is the technique of tying. In these cases, the social meaning architect attempts to transform the social meaning of one act n217 by tying it to, or associating it with, another social meaning that conforms to the meaning that the architect wishes the managed act to have. n218 The tied text thereby gains some of the associated meaning of the tied-to text.

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n217 Throughout this Part, I speak of the social meaning of an act. But as should by now be clear, acts are not the only things with social meanings. Just as easily, inaction, status, or persons, for example, can be the source of a social meaning.

n218 See William A. Gamson, Political Discourse and Collective Action, 1 Intl Soc Movement Res 219, 225-28 (1988).

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The technique is extremely common. n219 Think of how endorsements in advertising work: Michael Jordon endorses Nike shoes. Some of his social capital is transferred to the product endorsed, and the meaning of wearing Nike shoes changes. n220 Gap tells us about the world of famous and diverse people who wore khakis. Some of their social capital is transferred to this kind of trousers, and the meaning of wearing khakis changes. In each case, the tying builds a link between the text and an association existing in the social context.

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n219 Marketers call this brand-name leveraging. See generally David A. Aaker, Managing Brand Equity: Capitalizing on the Value of a Brand Name (Free Press, 1991).

n220 Note, the person transferring this capital in a sense is issuing a bond to the product; if the tie is a bad one, then it can come back to haunt the person transferring the capital.

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The link can transfer negative as well as positive value. A candidate for Congress ties her opponent to the President, hoping that negative views about the President will transfer to the opponent. The link can also be used either to change (offensive construction) or preserve (defensive construction) social meaning: In an effort to preserve smoking as an accepted social practice, for example, tobacco manufacturers appeal to the liberty of the Declaration of Independence.
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Similar transfers were in the examples I sketched above, particularly the Soviet motorcycle helmets example. n221 There the government attempted to brand wearing helmets as "imperialist," hoping to trade on some of the accumulated social capital behind the notion of imperialism to induce individuals to stop using helmets. The South's regulation of dueling too: n222 By making dueling illegal, the government's effect (if there was one) was not the direct deterrence caused by fear of prosecution--the likelihood of detection or prosecution was quite small. The effect, if any, of the regulation came from tying the act to the governmental stigma of "illegality." n223

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n221 See Section II.A.1.

n222 See Section II.A.4.

n223 As I discussed, the cost to a gentleman of this stigma may have been slight, so as a technique, this was weak.

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Whether negative or positive, tying functions by focusing a meaning--by making an association that clarifies the meaning along some dimension, sometimes by implicitly breaking another link that before existed.

A second technique is more intriguing. Indeed, it is this example that I believe the surprise. For our focus in law is often on how law functions to clarify. Here it functions not by clafifying, but by blurring. This is the technique of ambiguation. n224 With this technique, the architect tries to give the particular act, the meaning of which is to be regulated, a second meaning as well, one that acts to undermine the negative effects of the first. In this sense, while tying is about establishing that X is like Y, ambiguation is about establishing that X is like Y or Z. It simply adds a link without denying an existing link, and thereby blurs just what it is that X is.

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n224 One might view ambiguation as a nested opposition with the idea of tying: ambiguation functions by blurring the link with some attributes, and emphasizing the link with others. See J.M. Balkin, Nested Oppositions, 99 Yale L J 1669 (1990), reviewing John M. Ellis, Against Deconstruction (Princeton, 1989).

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Once this pattern is seen, the examples are many. The Nazis required Jews to wear yellow stars. Wearing a star had then a particular meaning, in part constructed by disambiguating who were Jews and who were not, thereby facilitating the expression of racial hatred. Danes who opposed the racism of the Nazis then began to wear stars themselves. n225 Their action then ambiguated the meaning of wearing a star. Now wearing a star
[*1011] meant either that the person was a Jew or that the person was a Dane supporting the Jews. Their action also tied the Danes to the Jews: now Danes were seen as supportive of the Jews.

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n225 Or so it is said. See Jorgen H. Barfod, Norman L. Kleebatt, and Vivian B. Mann, eds, Kings and Citizens: The History of the Jews in Denmark 1622-1983 (Jewish Museum, 1983).

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Nkosi Sikelel was the song of the black protest in South Africa. In 1963, the South African Parliament declared it the official anthem of Transkei, the earliest ethnic "nation" created under the South African homelands policy. n226 The aim n227 of the South African government was to give the singing of the song in Transkei a dual meaning, thereby weakening its association with the protest movement. Ambiguation was used to undermine the power of the song's social meaning.

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n226 Comaroff and Comaroff, 1 Of Revelation and Revolution at 3 (cited in note 141).

n227 Though unsuccessful, as I discuss below. See text accompanying note 230.

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At one time, vendors did not systematically check whether a credit card was stolen. One reason for this was the cost; one part of this cost the actual transaction cost in looking up the card, either in a booklet, or on a machine; the other part the insult cost, delivered to the cardholder whose card gets checked. One simple way to minimize the latter of these two costs is to make a rule about when cards will be checked--all purchases over $ 500, for example. Such a rule, while increasing the costs of verification because increasing the number of verifications, will also reduce an insult cost in any particular verification. Again, the rule ambiguates the meaning of any particular verification. (The same point: think of metal detectors at airports.)

Ambiguation is common in the examples I sketched at the start as well. The dueling example is the clearest. When the government makes dueling a disqualification for office, it transforms the meaning of the act of dueling--from an act that is solely a measure of a man's honor, to an act that both is the measure of a man's honor and also inhibits the gentleman's ability to serve civil society. The act thereby becomes both honor-enhancing and honor-defeating. And this change in the social meaning of the act no doubt

will affect its incidence. Since the benefit of the act has been reduced, so too will its demand be reduced.

Two other examples of ambiguation from my initial list are essentially the same, and I can present them quickly. These are the examples of the Civil Rights Act, n228 and helmets in hockey. n229 In each case, the meaning architect attempted to change the social meaning of a particular act--the act of accommodating
[*1012] blacks or the act of wearing helmets--by giving it a second meaning--the meaning of simply obeying the law or following the rules--thereby making ambiguous the real reason that the same actors were doing the particular act. By ambiguating the meaning of the action, one undermines any stigma attached to the action, making it easier for the action to be taken.

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n228 See Part II.A.2.

n229 See Part II.A.3.

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The pattern should now be plain. Sometimes semiotic techniques function by disambiguating a particular action or status--naming it, if you will. (This is tying.) Sometimes they function by giving the action a second meaning. (This is ambiguation.) Neither, of course, is always successful. Ambiguation was not successful in the South African example. n230 Nor would tying always be successful. n231 There are limits to the power of any architect to transform meaning through either semiotic technique.

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n230 See Comaroff and Comaroff, 1 Of Revelation and Revolution at 3 (cited in note 141).

n231 Imagine a high school principal who wants to dissuade students from smoking in the bathrooms. Say smoking is considered "cool" by high school students. The principal wants to tie that meaning to a negative social meaning, so she reveals to the students that the smartest student in the class is not a smoker, so neither should they be. But of course this move in this context would be a complete failure. To be different from the smartest student is more, not less, "cool." To undermine the meaning of "cool" the principal would have to tie smoking behavior to images that are not cool, but, in context, that could well be impossible.

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But my aim here is not to map a guide for successful meaning management; it is instead to map the possible moves of meaning management. Both techniques, in some cases, give the meaning architect the ability to shift social meaning by changing the marginal social cost of the same social act. Where the cost is changed by narrowing the range of meanings possible, that is achieved through tying; where the cost is changed by multiplying the range of meanings possible, that is achieved through ambiguation.

b) Behavioral techniques. Meaning construction is more than speaking differently. For it to function, it must succeed in recreating understandings and expectations. To create these understandings and expectations--in the sense that they are learned and then taken for granted--requires a change in behavior sufficient to internalize a set of understandings that construct this new meaning, or, in the case of defensive construction, a change in behavior to resecure a social meaning that would otherwise dissolve.
[*1013]

We can isolate two such behavioral techniques--techniques for changing meaning by changing behavior--in the above examples. The first is a regulation designed to inhibit a certain behavior that would otherwise aid in the construction or reinforcement of a disfavored social meaning. Segregation, for example, is both an instance of racial harm and a behavior that reinforces the social meaning of inequality. Prohibiting segregation is a way of undermining practices that reinforce social meanings of stigma and inequality.

Another example makes the point more directly. Under the Fair Housing Act, it is illegal for a real estate broker to indicate, whether asked or not, what the racial makeup of a community is when a buyer is purchasing residential property. n232 Nor can a broker indicate the racial patterns of purchasing and selling in a neighborhood. n233 Both of these restrictions attempt to reduce the number of economic decisions made on the basis of race. One effect of reducing the incidence of such actions may be to undermine the racist social meanings built into contemporary American society; or so the framers of Title II thought.

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n232 42 USC section 3604(c) (1988).

n233 42 USC section 3604(e) (1988).

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The best examples of inhibition, however, are in the context of defensive construction. n234 Think again about antimiscegenation laws. These laws inhibit an action--interracial association--that over time would erode the social meaning of white superiority. Or consider antisodomy laws. Once sodomy became identified with homosexual sex, the function of these laws was to reduce the incidence of homosexual sex, thereby preserving a dominant morality against homosexuality. Bowers v Hardwick n235 is as explicit as any opinion could be on this: The State of Georgia was constitutionally permitted to use antisodomy statutes to "preserve" the moral views of Georgia (read: orthodoxy) that homosexuality was wrong.

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n234 See Part II.C.

n235 478 US 186, 196 (1986).

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Inhibition, then, is one behavioral technique for changing social meanings. The second technique is to induce actions that tend either to undermine or to

construct a particular social meaning. n236 This technique I will call ritual. Here, the more bla- [*1014] tantly constructive actions discussed in the political construction examples above are illustrative. Political ritual is the easiest case, and Barnette serves as a helpful guide through this example.

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n236 What it means to "induce" an action in context is of course ambiguous. The rituals of the Shabot are rituals, but they are in some sense inactions, not actions. The notion, however, is that it is a practice distinct from what otherwise would have happened, and this acts to support the meaning being sought.

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In West Virginia, children were required to stand and salute the flag in school. Barnette protects the right of some students not to participate in this ritual: n237 Because forced participation in ritual could be inconsistent with fundamental religious views, the Court excepted dissenters from the schools' regulation. n238

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n237 319 US at 642.

n238 See the discussion in note 10.

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But as many have noted, n239 this does not mean that West Virginia is not free to establish political orthodoxy. Indeed, that is precisely what the morning ritual did. Through a practice of reverence to the flag, many n240 of these students will likely become inculcated with patriotism as a fundamental political value. (Or at least we could expect as much in 1940.) It is likely that this ritualistic practice simply constructs an orthodox view, a view that makes it more difficult for Jehovah's Witnesses, among others, to exist in this culture, and a view that expresses a very particular political judgment. n241

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n239 See, for example, Shiffrin, 27 UCLA L Rev at 567 (cited in note 6).

n240 Many, not all--again, particularly in high schools, it may be enough for the state to endorse something for the students to adopt the opposite view, but perfection is not the test for possibility.

n241 And indeed, one could say, the opinion in Barnette itself was an act that was constructing a certain social meaning--this time the social meaning of the First Amendment. Through its proclamation, Jackson established a conception of neutrality in America, a conception itself no less an orthodoxy simply by virtue of being a commitment to antiorthodoxy.

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Of course it could construct different views as well--indeed, perhaps the orthodox view the First Amendment is said to require. It could construct the view that tolerance of dissenting views is permitted, so long as the dissent does not interfere with the dominant view. The dissenters may sit silently, but in this permission is encoded much about what dissent in America can mean. This code is no less a construction than forcing a salute. It is a meaning, induced through public forms of action.

3. The collective action problem revisited.

Two techniques of semiotics--tying and ambiguation--and two techniques of behavior--inhibition and ritual--serve to alter or preserve social meanings. Together these four describe com- [*1015] mon and sometimes successful methods for a government or other social meaning architect to alter the balance of semiotic costs confronting someone engaging in, or not engaging in, a particular behavior. They can, that is, alter the costs of that behavior. By altering such costs, they are able to alter behavior through changing social meaning. So much is true without believing that all or any of these four techniques together could control or manage all social meaning.

Of these four, certainly ambiguation is the most interesting. For while we ordinarily think of law as functioning to clarify obligations and norms, here it functions by obscuring what was clear.

How do these techniques relate to the collective action problems that began this Section? All four techniques are solutions to this collective action problem, n242 for each is transformative of the selective incentives facing an individual, at least so far as the link, or break of a link, identified in each succeeds in a sufficiently large proportion of the collective. When the meaning architect acts to tie a particular action to another, and thereby trade on the meaning associated with the other, she is doing something that individuals acting alone cannot so easily do. If successful, then the tie increases or decreases the value of the new social meaning. So too with ambiguation: If the architect has it within her power to add a meaning to a particular action--say by making it "unlawful"--then this added meaning thereby changes the selective incentives associated with the targeted action. Now its meaning is different than it was before, and now that it is different, on the margin, behaviors will be different as well.

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n242 Again, there is a collective action problem whether one thinks the change pareto efficient, or Kaldor-Hicks efficient. In the most general sense, the problem is how to induce people to behave according to the efficient norm, however one decides it is efficient.

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Behavioral techniques function in the same way. By inhibiting or inducing actions, the techniques change what constructs a particular meaning; as those components change, so too the implicit costs of behavior under that meaning change. As those costs change, behaviors change. To the extent that the government then subsidizes or penalizes a certain structure of social meaning, that meaning can be transformed.

Each of the four techniques functions to solve the collective action problem by transforming the incentives individuals face, through changing the benefits and costs associated with these different actions. Tying raises (or lowers) the value of the new
[*1016] meaning; ambiguation confuses its cost; inhibition increases the cost of the old, rejected meaning; rituals serve to coordinate individuals in support of a new meaning.

B. Liberal Constraint on Social Meaning Making

So far I have described techniques for social meaning change, each variously successful in differing contexts. Before considering particular applications of these techniques, I want to add one final caveat to this discussion of social meaning management, one that is in particular crucial to understanding social meaning construction within liberal political traditions.

Relatively well established (if only relatively recently) within our political and social tradition is a strongly negative social meaning associated with the efforts of anyone to change social meaning. (Here by "change" I mean change relative to a status quo. There is little problem with acting to preserve status quo meanings.) So firm is this "antibrainwashing" ideal that to defeat an attempt to change social meaning in many contexts, one need only identify it as an attempt at social meaning management. This is the core of the passion against "political correctness." Those who oppose political correctness are not people who oppose rules against offensiveness generally. What drives the passion of the anti-PCers is the idea that what is "offensive" is being defined or determined by some particular group, and defined differently from what we happen now to find offensive. n243 What drives the passion, that is, is the idea that the social meaning of offensiveness is being managed. So too with government "propaganda": whenever we can see that the message being delivered is a message from the government, we are extremely suspicious of its content, and watchful about its effect. Speech by politicians is clearly less effective than speech by nonpoliticians in persuading or convincing someone of some truth. n244

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n243 See Stanley Fish, There's No Such Thing as Free Speech and It's a Good Thing, Too 3-7 (Oxford, 1994) (describing the "fairness" claims of those included in the debate).

n244 Compare the same point made by Sabina Lovibond:

The young child is "continually tampered with" . . . by watching television, and later by reading newspapers and magazines . . . . But as long as these moral and political steering agencies are not explicitly acknowledged as such . . . they are not even logically possible candidates for conscious adoption as paradigms of sound judgment about moral and political reality.

Sabina Lovibond, Realism and Imagination in Ethics 93 (Minnesota, 1983), quoting F.H. Bradley, Ethical Studies (Oxford, 1297).

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Call this the Orwell effect: when people see that the government or some relatively powerful group is attempting to manipulate social meaning, they react strongly to resist any such manipulation. What the Orwell effect means is that efforts by the government to regulate social meaning that are seen as efforts by the government to change social meaning will be less effective than efforts that are not so viewed. This does not mean that such efforts will be wholly unsuccessful--the government propagandizes about smoking or drug use or family planning, and no doubt on the margin these efforts have some effect. But what the Orwell effect does mean is that there is a strong incentive for the government to deliver its message of change while hiding the messenger. n245

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n245 Interestingly, moreover, it does not seem that the Orwell effect applies to corporate speech, or at least not in the same way. For it seems impossible to imagine a television advertisement by the State of Alaska congratulating itself on its contributions to the environment, but we see nothing odd in United Technologies or Exxon running the same ad. Corporate speakers are allowed to say, "we are great"; government is not. Or at least, such a message by government would be far less effective than the same message by the corporation.

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An excellent example is provided by the regulations giving rise to the case of Rust v Sullivan. n246 There the government required (partially) governmentally funded doctors to say certain things about what methods of family planning were best, and to refrain from giving women any information about abortion as a method of family planning. n247 The clear purpose of these regulations was to steer women away from abortion. But the power of this message was amplified dramatically by its being delivered, without disclaimer, by a doctor. Out of the mouth of a doctor, the antiabortion message had a much more powerful effect than an antiabortion message out of the mouth of Congressman Henry Hyde. (If, that is, doctors are seen as something other than the government.) In part because it was hidden that it was the government that was speaking, the government's message had a much more powerful effect, if only by deceiving poor women about the source of the message. And precisely because these women were least likely to have access to other sources of information, they were prime targets for this indirect propaganda.

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n246 500 US 173 (1991).

n247 Id at 187. In fact, if asked about abortion, these doctors were required to say that "we" do not consider it an appropriate method of family planning.

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What the Orwell effect will mean is that government will have an incentive to minimizes the extent to which its messages seeking change seem to be messages from it, by tying its mes- [*1018] sages to independent authorities (for

example, doctors) or authority (science).

As will be clearer when I discuss First Amendment doctrine below, the Orwell effect is oddly one sided. Although people resist the efforts of the government to "brainwash" us into thinking something new, few seem to worry about efforts of the government to support or confirm the existing or dominant orthodoxy. It is "brainwashing" to change the status quo; it is the ordinary stuff of government to preserve it. It would have been "brainwashing" for the Soviets to have turned us into Communists; but it is perfectly fine stuff for the American government to drum into our heads the sanctity of the market, or of democracy.

Why these differences exist, if they exist, I cannot explain. My point in raising them here, however, is simply to remark this difference in the social meaning of change and preservation, particularly as it applies to the government. No doubt the difference in meaning is tied to the very strong antitotalitarian history of the United States during this century at least. Indeed, we have forgotten some of the power of this tradition, reflected in the extremely skeptical view Americans took to advertising (seen as propoganda) when it first began to appear in the American culture. As Allan Winkler describes:

As Americans became increasingly aware of propaganda, many began to feel uneasy about its implications. They viewed it with a morbid fascination, studied and wrote about it, and began to fear its possible consequences. Propaganda to some seemed to have an unlimited force--the power to capture men's hearts and bypass their rational process. n248

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n248 Allan M. Winkler, The Politics of Propaganda: The Office of War Information 19421945 4 (Yale, 1978).

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Time and television have allayed the same fears about the effect of organized speech, at least when corporately organized. Perhaps because we do not believe that corporations can have complete control, the partial effects of their attempts to affect social meaning seem less significant as well. Whatever the reason, some difference in the appropriate speech of corporations and government exists. This difference in appropriateness has an effect on the methods employed by government and corporations to achieve their social meaning objectives. It does not mean, however, that government will give up such efforts, nor that government should give them up. It is neither the case that govern- [*1019] ment should have no role in the construction of social meaning, nor that it should have an unlimited role. The question is when such a role should be constrained, a question I return to in the final Part. First, however, I consider some applications of these ideas.

IV. Applications

It is my claim that an account of social meaning regulation will, at times, be necessary to understand social behavior, and will be useful in designing

regulations of that behavior. In this Part, I sketch briefly two examples that further make this point. In each, my claim is simply that an account that ignores this social meaning dimension to the behavior regulated will mislead.

A. The Regulation of Dangerous Sex

One response to "the AIDS crisis" has been the government's effort to regulate dangerous sex. So described, of course, this is not a new enterprise for government. All that is "new" is the type of danger being regulated. When preserving property structures by preserving marriage was important, "dangerous sex" was sex outside of marriage. When saving souls from damnation was important, "dangerous sex" was any sex without the structures of religion. In this somewhat less theistic time, "dangerous sex" is life-threatening sex, and the policy response to its emergence has been the search for ways to minimize such unsafe sex. n249

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n249 Michel Foucault, Sexual Discourse and Power, in Jeffrey C. Alexander and Steven Seidman, eds, Culture and Society: Contemporary Debates 199, 200-01 (Cambridge, 1990).

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I want to focus here on one account of such policies--the recent economic analysis of the AIDS crisis by Tomas Philipson and Richard Posner. Philipson and Posner's account is a continuation of a controversial application of law and economics to sexual behavior, first examined in Posner's book Sex and Reason. n250 The application is controversial because it extends economics to a paradigm of nonmarket behavior--sexuality.

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n250 Richard A. Posner, Sex and Reason (Harvard, 1992).

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My interest in the controversy, however, has less to do with a concern about extending economics outside traditional market domains. n251 I have no criticism in general of using economics as a tool for understanding nonmarket behavior, even sex behav- [*1020] ior. n252 Properly qualified, the rhetoric of economics is extremely useful in understanding fields not traditionally within the domain of economics--the work of France's Bourdieu and our own Gary Becker being obvious examples.

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n251 For an extremely powerful consideration of the book's use of economics, See David Charny, Economics of Death, 107 Harv L Rev 2056 (1994).

n252 There are criticisms enough--perhaps even too many--of the materialist aspect of Posner's work. See, for example, Frank, Passions Within Reason at 163 (cited in note 183).

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Instead, my interest is in the completeness of this economic account--in particular, the extent to which it incorporates an account of social meaning in its account of sex behavior. For what is striking about Philipson and Posner's work is their committed refusal to consider how social meaning may matter. With just a bit of unfairness, one could say, in the tradition of Marx, that Philipson and Posner are materialists, who proceed as if meaning can be ignored either because epiphenomenal upon something more fundamental, or because not subject to the same tools of economic study, or because not significant enough in the policy account they present to be reckoned. In what follows, I argue that none of these three excuses suffices to excuse this fundamental omission. Maybe economics cannot embrace this thicker account. But if it cannot, then its use in understanding this dimension of human behavior is essentially compromised.

Philipson and Posner's general approach is easily stated: economics is a tool for understanding how individuals respond to changing incentives; AIDS is a disease "spread primarily though voluntary intimate contacts," n253 and these contacts are influenced by changing incentives. Therefore, economics can help explain the spread and control of AIDS, at least better than models less focused on behavioral responses to changing incentives.

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n253 See Tomas J. Philipson and Richard A. Posner, Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective vii (Harvard, 1993).

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So much is not controversial. The controversy comes when specifying the scope of "incentives" for which Philipson and Posner account. For they begin with traditional assumptions of economics--that preferences are "fixed"--and they analyze behavior assuming that these preferences remain fixed. From the analysis so far, however, we can see how the view could be broader. Rather than taking preferences, institutions, and norms as fixed, we could include in the analysis the social meanings that construct these assumedly fixed things, and ask how easily these social meanings could be changed. Managing social meaning could change individual preferences, n254 and by changing prefer- [*1021] ences, it could be one dimension in the practice of changing incentives to change behavior. n255

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n254 There is an important link to the discussion of the collective action problem above. For again, this raises the ambiguity in the collective action. If it is changing the preferences, how do we know it is efficient? See Part III.A.

n255 See Dau-Schmidt, 1990 Duke L J at 14-22 (cited in note 208) (examining preference-shaping role of criminal law). On a more related point, see Amartya Sen, Behavior and the Concept of Preference, 40 Economica 241, 252-53 (1973) (warning against inferring personal preferences solely from individual behavior).

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In many cases, ignoring the possibility of changing social meaning will matter little. But focus for a moment on a case where it matters a lot--Philipson and Posner's discussion of the need for government support of education about AIDS. Economists are traditionally skeptical about the need for government to subsidize education. n256 Education, it is said, is a commodity just like any other; as with all commodities, individuals will purchase more of that commodity so long as the marginal return from the last dollar spent is greater than one dollar. Because there are no collective action problems or failures of information involved, there is little reason to expect a market failure in the education market. Therefore, the economist concludes, an adequate--in the sense of maximizing total social welfare--amount of education will be provided without government intervention.

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n256 For an overview of such skepticism, see Larry L. Leslie and Paul T. Brinkman, The Economic Value of Higher Education 28 (Macmillan, 1988).

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So too with education about AIDS. There is a market for information about AIDS--people have an incentive to learn about AIDS just as they have an incentive to learn about what shots they need before going to a foreign country. n257 Given this incentive, people will spend resources to discover facts about AIDS, so long as the returns from that spending exceed the cost. Therefore, except for a narrow range of cases, Philipson and Posner argue, there is little purpose to government support of AIDS education. n258

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n257 However, the incentives to learn about AIDS may be a bit complex. If there is an incentive for self-deception, for example, this could complicate the information account.

n258 See Philipson and Posner, Private Choices and Public Health at 174 (cited in note 253) (concluding that findings "do not support the hypothesis that public expenditures on AIDS education increase knowledge about AIDS").

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Note the implicit premise about what function education serves: education is simply a tool for conveying information; it transmits facts the way a telephone transmits conversation. But there are at least two different functions that education could serve--compare the "educator" who directs his first-grade class to stand and pledge allegiance to the flag, with the "educator" who teaches that two twos are four. If "education" functioned solely as
[*1022] a transmitter of facts, one might well question the function government has in supporting it given market alternatives to its supply.

But education does, or can do, much more than convey information. As we have seen, in some cases education can alter social meanings. Social meanings are collective goods, and collective action is needed (sometimes, at least) to change collective goods. If there are existing social meanings that inhibit

public policy against AIDS--for example, the social meaning of wearing a condom--then one way of advancing social policy may be to reconstruct these social meanings. And as already discussed, if social meanings are collective goods, then there is an economic reason to support AIDS education--for as neoclassical economics well understands, unregulated markets will not supply a socially optimal amount of a public good.

What might these changes in social meaning look like? Consider first the social meaning of condom usage. There are at least two possible social meanings tied to the use of a condom in heterosexual sex. n259 Imagine first a world where using a condom is the exception, such that asking another to use it, or proposing its use voluntarily, both (1) signals to the other the belief that there is a special reason to use a condom, and (2) interrupts a ritualized sex dance, which does not ordinarily include putting on a condom. n260 In this world, the use of a condom imposes on the proposer at least two different, but significant, social meaning costs: first, the costs of what the signal could be signaling, and second, the costs of interrupting the sex dance (which, if interrupted, may induce other harms--anger, violence, or simply the stopping of the dance). In such a world, the incentives to use a condom--the avoidance of AIDS and pregnancy--are balanced against the full range of costs, some of which are ordinary economic costs--the cost of a condom and the decline in pleasure when using a condom--and some of which are social meaning costs.

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n259 I focus here on heterosexual sex because, to the extent there is inequality between sex partners, the effect I am remarking here will be exaggerated.

n260 See Aronson, The Social Animal at 240 (cited in note 186) (discussing low condom usage by sexually active college-age adults). As a response to this, some manufacturers have developed a female condom, that is inserted long before intercourse. See Elizabeth Kaye, Reality Dawns, NY Times section 2 at 8 (May 9, 1993).

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Now imagine a second world, where people ordinarily or always use condoms--or more importantly, where "ordinary people" ordinarily use condoms, and where an ordinary part of sex is the
[*1023] use of such a condom. In this world, "ordinary" or "normal" sex includes this step in the ritual of the sex dance--putting on a condom has become just one move in the sex dance itself, just as showering in the morning is one step in the ritual of morning in America but not in England. It seems plain that in this second world, the social costs to the use of a condom are less. Indeed, in this second world, to refuse the use of a condom is to signal abnormal behavior, and hence is to invite its own costs.

Between these two imagined worlds, all other costs being equal, we could predict that condom usage will be greater in the second world than in the first because the costs of using a condom in the first one are greater than the costs of using a condom in the second. n261 The incentives are different. Furthermore, the difference in these costs is a difference caused by a socially constructed reality, for certainly what is "ordinary" sexual behavior, or at least what are the ritualized steps in the "normal" sex dance are constructions of cultures,

and not science.

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n261 Philipson and Posner discuss the "costs" of condom usage. Philipson and Posner, Private Choices and Public Health at 32 (cited in note 253). On the social meaning costs of condom use, see Colin McMahon and Carol Jouzaitis, Taboos Leave Many Teens Unprotected, Chi Trib section 1 at 1 (May 24, 1994).

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The question for the policymaker, then, is what can be done in the first world to construct the social meanings that exist in the second world. n262 We've seen enough to gather some clues as to technique. The most common technique has been the technique of tying: Popular figures--Magic Johnson, for example--advocating the use of condoms. n263 A more successful technique has been tying the message to peer groups. Studies of the effect of education programs in schools, run in part by other students discussing the use of condoms, show that a sufficiently long-term program of education does have a statistically significant effect on long-term condom usage. n264 These studies also
[*1024] suggest that the change in behavior that is observed is not due solely to the transmission of new information. In fact, the information about AIDS was known before the change in behavior occurred. Even if education is not fully effective, the relevant question is whether it is an effective use of resources, which means whether it is effective given the amount spent. As many have noted, among policy options, AIDS education is relatively cheap.

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n262 Aronson discusses the same idea in The Social Animal at 91 (cited in note 186). Compare Murray Edelman, Political Language: Words that Succeed and Policies that Fail 9 (Academic, 1977) (discussing in general this problem of social meaning in policy determinations).

n263 The technique of tying AIDS to images of death have been less successful. As Aronson discusses, tying the image of AIDS to death actually reduces usage of condoms. Since "when contemplating having sex, people do not want to be thinking about death or disease," and therefore people simply deny the possible consequences from unsafe sex. See Aronson, The Social Animal at 90-91 (cited in note 186).

n264 See id at 240 (discussing success with "saying is believing" sex education program for students). See also Barbara A. Misztal and David Moss, eds, Action on AIDS: National Politics in Comparative Perspective 15 (Greenwood, 1990); Michael Quam and Nancy Ford, AIDS Policies and Practices in the United States, in Barbara A. Misztal and David Moss, eds, Action on Aids: National Policies in Comparative Review 25, 39 (Greenwood, 1990) (outlining several AIDS education plans). For a discussion of the success of the education programs in Switzerland, see D. Hausser, F. Dubois-Arber, and E. Zimmermann, Assessing AIDS Prevention in Switzerland, in F. Paccaud, J.P. Vader, and F. Gutzwiler, eds, Assessing AIDS Prevention 116 (Birkhauser, 1992).

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To be fair, Philipson and Posner do in fact raise the possibility that a change in "attitudes" may be an effective policy tool. n265 But they discuss this possibility on just a single page of their text. And rather than reviewing what is a large literature in sociology and anthropology discussing the effects of AIDS education on behavior, n266 Philipson and Posner raise and dismiss--with one cite to a Wall Street Journal article discussing condom sales--the possibility that attitudes are an important part of the policy debate. n267

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n265 See Philipson and Posner, Private Choices and Public Health at 169 (cited in note 253). For an account of attitude or "preference shaping" in economics, see Dau-Schmidt, 1990 Duke L J 1 (cited in note 208). The idea of course is not limited to economics. See Dorothy Ross, The Origins of American Social Science (Cambridge, 1991). There is a longstanding debate in social psychology about the relationship between attitudes and behavior. See Aronson, Social Animal at 159 (cited in note 186) (concluding that on the margin, changes in attitudes can affect behavior).

n266 See, for example, Hausser, Dubois-Arber, and Zimmermann, Assessing AIDS Prevention in Switzerland at 116 (cited in note 264); Misztal and Moss, eds, Action on AIDS at 15, 39, 89, 192, 202 (cited in note 264); Heather J. Walter and Roger D. Vaughan, AIDS Risk Reduction Among A Multiethnic Sample of Urban High School Students, 270 JAMA 725 (1993); Leon McKusick, et al, Longitudinal Predictors of Reductions in Unprotected Anal Intercourse among Gay Men in San Francisco: The AIDS Behavioral Research Project, 80 Am J Pub Health 978 (1990); Dooley Worth, Sexual Decision-Making and AIDS: Why Condom Protection among Vulnerable Women is Likely to Fail, 20 Stud Fam Planning 297 (Nov/Dec 1989).

n267 Charny makes the same observation about Philipson and Posner in 107 Harv L Rev at 2075 n 55, 2076 (cited in note 251).

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If one ignores the social meaning dimension of education, then one could easily conclude that subsidies for education are unjustified. For again, by ignoring the social meaning effect of education, one ignores the collective action problem that social meaning presents. If one includes the social meaning account, then there is in theory at least an economic reason for government support of education, even if there remains an empirical question about the relative success of this reconstructive effort.
[*1025] The narrower focus of Philipson and Posner is blind to this empirical question, and hence misleading about what policy should be recommended. Here at least, Occam's razor draws more blood than insight. n268

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n268 For a much more general account of the change in the "symbolic and social reconceptualizations" of AIDS that would be necessary to change social and professional behavior, see Paula A. Treichler, AIDS, Homophobia, and Biomedical Discourse: An Epidemic of Signification, in Douglas Crimp, ed, AIDS: Cultural Analysis, Cultural Activism 68, 69 (MIT, 1991).

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B. The Regulation of Smoking

Consider now the example of smoking regulation, which offers the broadest range of social meaning regulation of any example surveyed so far, with the best examples coming from the earliest efforts to regulate smoking. Antismoking regulation originated "in the last twenty years of the nineteenth century." n269 In 1890, "26 states had passed legislation prohibiting the sale of cigarettes to minors," and by 1909, "17 states had prohibited the sale of cigarettes altogether." n270 But the passion for regulation died just about as quickly as it arose. "By the early 1920s, all state legislation barring the sale of cigarettes to adults had been repealed." n271

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n269 Joseph R. Gusfield, The Social Symbolism of Smoking and Health, in Robert L. Rabin and Stephen D. Sugarman, Smoking Policy: Law, Politics, and Culture 49, 50 (Oxford, 1993).

n270 Id.

n271 Id at 53.

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What explains the rapid transformation in the regulation of smoking? First, note what it was not: the early regulation of cigarettes had no real connection to health concerns. "There was no consensus, among either medical researchers or the lay public, that the physiochemical consequences of cigarette smoking were very harmful to the health of the smoker or to the nonsmoker." n272

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n272 Id.

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Instead, what drove the antismoking campaign of the late nineteenth century was the "scandal" that women began to smoke. n273 Not a pollution of health, but rather a pollution of social order motivated this first regulation. "During the 19th century in America, smoking was a major symbol and sign of the adult male in American life. The segregation of the genders and all [*1026] that it implied was dramatically portrayed in the exclusivity of smoking as a masculine form of pleasure." n274

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n273 Id at 51.

n274 Id.

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In part, we might say that the change in smoking behavior was induced by a change in smoking technology. Smoking among men was primarily cigars and pipes. But when cigarettes appeared in the late nineteenth century, the sex-segregated patterns of smoking blurred. New technology--both the cigarette and the safety match--made it easier for women to smoke. "Cigarettes could be easily hidden in purses," and were "easier to light, and milder than their competitors." n275 As a result, cigarettes "became more accessible to two groups for whom smoking had been under a restrictive taboo: women and young people, especially boys." n276

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n275 Id.

n276 Id.

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The response to this increase in smoking among women and children--whose social status was, after all, beneath that of men--was rapid and predictable. Editorials tied female smoking with "continental habits" and ambiguated the action by identifying female smoking as against "good manners." n277 The sentiments of the time are well captured in a speech of a New York assemblyman, introducing a bill to prohibit the sale of cigarettes:

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n277 Id.

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Do you know that any number of our High School girls, as well as boys, smoke cigarettes, and do you know that many foolish women are beginning to believe that it is real smart to learn to smoke? . . . Women in society have taken to smoking cigarettes and persons who are on the ragged edge of society think they have as much right. n278

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n278 Id, quoting Says Schoolgirls Smoke, NY Times 20 (Feb 12, 1905).

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During the growth of this anticigarette legislation, the dominant consumers of cigarettes were women and boys. It was therefore easy for legislation to target cigarettes without inhibiting the smoking habits of men. But World War I changed all this. The very same qualities that made cigarettes attractive to women--smallness, ease of carrying--made cigarettes the choice among soldiers. Cigarette consumption among men grew dramatically during the war, as men gave up the prestige of the cigar for the convenience of the cigarette. n279

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n279 Gusfield, The Social Symbolism of Smoking and Health at 53 (cited in note 269).

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The end of the First World War brought a second change that would further the popularity of cigarettes. Soon after the War, demands for equal rights for women--and acceptance of equality for women--grew. Cigarettes soon became one symbol of that campaign: already tied to women, cigarettes became a "symbol of the demand for equality of the sexes." n280 Thus, as female smoking moved from being a sign of social deviance to a symbol of equality, the demand for cigarette regulation quickly fell to the wayside.

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n280 Id.

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The cycle of this early cigarette regulation, therefore, tracked not some question of health, but solely an issue of social meaning. Men used the law to help support social inequality, but as equality norms began to dominate, the laws enforcing social inequality fell away. The rise and fall of cigarette regulation at the turn of the century depended primarily upon the rise and fall of the social desire to support a socially dominant male. Regulation arose originally to defend the social status of the male, and it fell as soon as the social support for sex-based inequality eroded away.

The second wave of antismoking regulation was not so directly tied to moralistic or gendered social meaning. Instead it grew from the social meaning of science. n281 In 1964, when the Surgeon General released a report that announced that smoking was dangerous to health, smoking regulation in America was virtually nonexistent. "In the forty years before the publication of [the report], not only was there no serious thought given to banning cigarette smoking, but there was virtually no regulation at all of tobacco sale or use." n282 Consumption increased. This was to change after 1964. "Until 1964, while some intuitive feeling that smoking was harmful existed among a number of Americans, there was no widely accepted authority that settled the factual question of the healthfulness of smoking." n283 The 1964 report
[*1028] became this widely accepted authority, in time settling the factual question regarding smoking.

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n281 The link here to the work of Michel Foucault is strong. Here, the institution of science is able to define individuals as "unreasonable" beause of its ability to define certain practices as unhealthy. This form of knowledge thus disciplines individuals into certain kinds of behavior. After this knowledge is represented as knowledge, individuals must choose whether to become "unreasonable" by ignoring it, or conform. Compare Michel Foucault, Discipline and Punish 26-27 (1977); Michel Foucault, 1 The History of Sexuality: An

Introduction 92-93 (1990).

n282 Robert L. Rabin and Stephen D. Sugarman, Overview, in Robert L. Rabin and Stephen D. Sugarman, eds, Smoking Policy: Law, Politics, and Culture 5 (Oxford, 1993).

n283 Gusfield, The Social Symbolism of Smoking and Health at 53 (cited in note 269).

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This report and subsequent similar studies were "enormously important in stimulating the cultural redefinition of smoking." n284 But it is important to locate the source of this significant effect. The second wave of smoking regulation got its social "authority in the research of medical science." n285 This authority itself is a form of social meaning. It flows not directly from "facts" of individual experience, but from an institution of science that can certify the "real" "character of smoking and health." n286 The 1964 report was as successful as it was in convincing individuals about the dangers of smoking because it could connect with an institution that had gained a relatively secure authority, believed to be independent of political influence and dependent upon truth.

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n284 Robert A. Kagan and Jerome H. Skolnick, Banning Smoking: Compliance Without Enforcement, in Robert L. Rabin and Stephen D. Sugarman, eds, Smoking Policy: Law, Politics, and Culture 69, 82 (Oxford, 1993).

n285 Gusfield, The Social Symbolism of Smoking and Health at 54 (cited in note 269).

n286 Id at 57.

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The effect of the 1964 report was to convey information, which, in the model of Philipson and Posner, should have led to a fall in smoking solely because individuals recalculated the net utility from smoking, based on this new information. And according to their model, the resulting consumption of cigarettes, with all facts known, would be wealth maximizing. While smoking increases the risk of cancer and other diseases, if the benefit to the smoker is greater than the expected cost of injury, then, injury notwithstanding, smoking would be rational for some individuals. It would follow, according to this model, that there is no justification for public education once the facts about smoking are known.

But smoking is an addiction. As Gary Becker and others have discussed, if a commodity is addictive, then an individual, knowing all the relevant facts, may actually consume more of a commodity than is utility maximizing. n287 Simply stated, because cigarettes are addictive, individuals may consume more than they actually want. n288 Thus there may be reasons to take steps to reduce consumption below the level demanded when all facts are
[*1029] known--and therefore a public justification for efforts to reduce cigarette smoking below the "invisible hand of demand."

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n287 See Becker, Habits, Addictions, and Traditions at 5 (cited in note 207).

n288 I realize the gaggle of puzzles here, and I acknowledge the range of theoretical solutions to this notion of an individual wanting something other than he or she wants. Puzzles notwithstanding, there is an intuition here that I believe we all share, and it is upon this that I am relying.

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This perspective explains some of the justification for the third wave of antismoking regulation. "In the three decades since the report a distinct moral tone has been added" to the rhetoric of the antismoking campaign. n289 There are two dimensions to this new moralism: one painting the smoker as a pariah, and the second painting the smoker as weak, reckless, or without self-control.

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n289 Gusfield, The Social Symbolism of Smoking and Health at 60 (cited in note 269).

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Consider the second dimension first. One clear message from recent medical science is that many aspects of illness can be construed as resulting from lifestyle choices--as the direct consequence of chosen behavior. "How we eat, drive automobiles, accept stress, drink alcohol, exercise, conduct sexual relations, lead sedentary lives, use drugs, and smoke tobacco are widely understood today as important to the health of the individual." n290

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n290 Id at 49.

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Tied to this view of health as a function of choice, the antismoking campaign could link itself to the emerging health and fitness campaigns. As health became a defining feature of social life, smoking stood at odds "with the images of today's leaders, heroes, and idols. . . . Smokers [in the public's eye] are increasingly marginalized and considered reckless." n291

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n291 Rabin and Sugarman, Overview at 18 (cited in note 282).

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The first dimension of the change--viewing smokers as pariah--became strongest after the 1986 Surgeon General's report about the effects of second-hand smoke. Once the public accepted the notion that smoking was harmful not just to the smoker, but also to third parties, it became impossible for smokers "to take refuge in a libertarian ethic, claiming that cigarette

smoking affected only themselves." n292 The views about second-hand smoke "turned the distaste of smoke into a positive source of exclusion. The smoker became on the defensive as the act of smoking was increasingly banished from many social circles and the smoker so frequently admonished not to smoke." n293 Together, these two changes have resulted in a "dramatic change in the social acceptability of tobacco smoking. Smokers feel condemned, isolated, disenfranchised, alienated." n294

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n292 Kagan and Skolnick, Banning Smoking at 83 (cited in note 284).

n293 Gusfield, The Social Symbolism of Smoking and Health at 65 (cited in note 269).

n294 Kagan and Skolnick, Banning Smoking at 79 (cited in note 284). See also Thomas C. Schelling, Addictive Drugs: The Cigarette Experience, 255 Science 430 (Jan 24, 1992); Thomas C. Schelling, Economics and Cigarettes, 15 Preventative Med 549 (1986).

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By now it should be clear that a significant portion of current American attitudes about smoking derives not from science alone, but from social meanings that have become attached to the actions of smoking. The clearest proof of the role of these social meanings is the comparison of smoking behavior across cultures. Europeans know the facts about smoking as well as Americans, yet as anyone forced to suffer the Frankfurt Airport knows, smoking behavior is radically different. This difference cannot be due to a lack of knowledge. It must be due instead to a difference in culture--which is shorthand for a difference in the collection of incentives presented by different social meanings regulating smoking behavior. n295

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n295 The same point is made by Douglas and Wildavasky about pollution: "ideas about pollution are not sufficiently explained by the physical danger." See Kagan and Skolnick, Banning Smoking at 81 (cited in note 284), quoting Mary Douglas and Aaron Wildavasky, Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers 38 (California, 1982).

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Was the government responsible at all for these changes in the social meaning of smoking? The answer to this is an extremely qualified, yes. There is little doubt that government had a role in transforming the meaning of smoking. But there is also little doubt that it could assume that role only because of a range of factors that made the American culture open to the transformations that government sought. Government could effect this change in social meaning only because society was in part open to accepting this change. This means that the government's role in the change of social meaning was limited in a number of important ways. The first limitation was timing: What is most striking about smoking regulation today is the extremely high degree of compliance. But "not

many years ago, the imposition of restrictions on smoking probably would have resulted in widespread evasion and enforcement efforts would have encountered considerable defiance." n296 "Like surfers, legislators . . . who wish to change everyday social norms must wait for signs of a rising wave of cultural support, catching it at just the right time." n297

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n296 Kagan and Skolnick, Banning Smoking at 78-79 (cited in note 284).

n297 Id at 85.

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A second limitation is the extent of the punishment for deviance from the emerging social norm. What is required for the inducements not to backfire is that punishments be proportional and that there be alternatives or accommodations for smokers. This reduces the cost of the emerging norm, and hence makes it
[*1031] easier for the nonsmoker to feel justified in enforcing the nonsmoking norm. To make the transition smoothly, both the enforcers and the deviants must be able to treat each other less as "criminals," and more "as errant family members." n298

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n298 Id at 77.

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These are the limits, but what are its techniques? We can fit these examples into the catalog of tools sketched above:

Tying. As I have just reviewed, a significant part of the social meaning costs of smoking is that smoking has been successfully tied to unhealthy behavior, and unhealthy behavior has been successfully tied to human choice. To smoke, under this reading, is to reveal a certain personal weakness, and in the culture of fitness, individuals do not want to be weak. Just as cigarette consumption benefited in the 1920s from its tie with the movement for equality among women, it has been harmed in the 1980s because of its tie with unhealthy (read: weak) behavior.

Examples from other nations are useful here as well. While the dominant form of cigarette regulation among nations is the requirement of labels indicating the danger of cigarettes to health, some nations impose regulation to prevent cigarette smoking from being tied, through advertising, to socially approved forms of behavior. Argentina, for example, forbids cigarette advertisements that picture young or socially attractive individuals smoking. n299 Similarly, Cyprus forbids the depiction of smoking as a stylish or successful form of behavior. n300 Both regulations, however successful, are motivated by the idea that tying in advertisement has an effect on smoking behavior. n301

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n299 See World Health Organization, Legislative Responses to Tobacco Use 1 (Martinus Nijhoff, 1991).

n300 Id at 84.

n301 For an argument that advertising does not have this effect, see Michael Schudson, Symbols and Smokers: Advertising, Health Messages, and Public Policy, in Robert L. Rabin and Stephen D. Sugarman, eds, Smoking Policy: Law, Politics, and Culture 208, 209-11 (Oxford, 1993).

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Ambiguation. The second semiotic technique of social meaning reconstruction is ambiguation. Consider the ambiguating effect of signs against smoking. There are no smoking police. n302 What a smoking sign does, beyond clearly marking out boundaries for those who want to know where they can freely smoke, is give the nonsmoker a tool that before she would not have. Without this sign, in requesting a smoker not to smoke, the nonsmoker would be asserting her preference for a smoke-free environ- [*1032] ment over the smoker's preference for the right to smoke. The conflict would be a conflict among the preferences of two otherwise equal citizens. But after the sign, the nonsmoker's request is ambiguous between advancing her preferences over the smoker's, and insisting that the smoker simply obey the rules. The ambiguation gains power, then, from what Joseph Raz would call "practical authority," the instinctive desire of individuals to follow social rules, n303 or as described above, the desire of individuals to conform. Having the rule means that its enforcement flows not necessarily from the preference of the enforcer, but also possibly from an independent desire to conform to rules.

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n302 See Robert Cooter, Market Affirmative Action 31 San Diego L Rev 133, 167 (1994).

n303 See the discussion of Raz's notion of practical authority in Kagan and Skolnick, Banning Smoking at 86-87 (cited in note 284).

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A second example of ambiguation comes from Singapore, where warnings on cigarette packages must include not just the information about how cigarettes are harmful to health, but also a warning that "Smoking harms those around us." n304 Thus, smoking is publicly tied to the notion of harming others, where before it seemed only to harm the smoker. Once again, the tie ambiguates the action, changing it from being purely personal to one being socially harmful, again increasing the social meaning cost of the action.

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n304 See World Health Organization, Legislative Responses at 185 (cited in note 299).

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Inhibition. The technique of inhibition works by stopping a certain behavior so as to weaken support for the social meaning associated with it. With smoking, the examples are obvious. First, many nations prohibit smoking among the young, thereby avoiding the initiation of this addiction when people are particularly vulnerable. n305 Similarly, many nations prohibit promotional gifts of cigarettes, which again would induce behavior inconsistent with the social meaning being sought. n306 In both cases, the behavior of smoking is attacked not broadly by prohibiting all smoking, but narrowly by targeting specific groups, with the aim to weaken social support for the behavior itself.

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n305 See, for example, El Salvador and Malta, in id at 89, 126-27.

n306 See, for example, Belgium, France, and Ireland, in id at 57, 93, 115.

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Ritual. The hardest type of social meaning regulation to find is ritual, perhaps because there is in fact no such example. Indeed, as the description of ritual above suggested, we may be in an age when the technique of ritual is extremely rare, existing only when there is a long-standing tradition that supports the ritualistic practice. We have a ritual of singing the national an [*1033] them at baseball games, but it would be extremely difficult to begin a ritual of singing before the start of work each morning, as in Japan.

Nonetheless, not to be deterred by truth, let me suggest one example of ritualistic behavior that may support an antismoking norm. Consider the period during which smoking was not permitted on any flight--not the general ban on smoking on domestic flights, but the ten minutes during takeoff and landing during which smoking was not permitted on any flight in America, beginning in 1979. n307

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n307 See Action on Smoking and Health v Civil Aeronautics Board, 699 F2d 1209, 1211 n 5 (DC Cir 1983).

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From the standpoint of the passenger, it was not clear just why smoking was banned for these first few minutes of every flight. The simplest explanation is ventilation, which, until the aircraft takes off, is not fully functioning. n308 But no one explained the reason for the ban when invoking the ban, and because linked to the general presentation of safety concerns--how to exit the plane, where the life-jacket is stored, etc.--it takes on a very different meaning. Rather than air quality, it is as if the danger of smoking is actually far more threatening--as if because takeoff and landing are the two times when the risk of a crash is greatest, lighted objects are best avoided during a crash.

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n308 See id.

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Whether or not there is a marginal increase in safety, it should be clear that the effect of this ritualistic period of nonsmoking was actually much broader than any marginal safety provided on the 185 commercial planes that crashed during these 8 years without bursting into flames. n309 For consider the broader meaning of the practice. For twenty minutes on every commercial flight in America from 1979 to 1987--a total of one billion minutes n310 --passengers were required to engage in a ritual--nonsmoking--that signaled the public harm that this otherwise private activity could represent. What the ritual signaled was that this at-one-time-considered private activity (smoking) really had an extremely important life-threatening public dimension. The image was this: that those few people sitting in the last
[*1034] few rows of the airplane actually held in their hands the fuse to a devastating bomb that could, if lit, annihilate all on the aircraft. In those twenty minutes of flight, their power, and hence the danger of their habit, was ritualized for the 3.1 billion who flew during those 8 years. n311

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n309 Figures derived from Mark S. Hoffman, ed, The World Almanac and Book of Facts: 1992 699 (Pharos, 1991) (Graph: U.S. Airline Safety). See also US Department of Transportation, FAA Statistical Handbook of Aviation 154 table 9.5 (1988).

n310 There were about 50.2 million departures between 1979-87. US Department of Transportation, FAA Statistical Handbook at 154 table 9.5 (cited in note 309). At 20 minutes per flight, that makes a total of 1.004 billion minutes.

n311 Figure derived from Hana Umlauf Lane, ed, The World Almanac and Book of Facts: 1981 214 (Newspaper Enterprise, 1980); Hana Umlauf Lane, ed, The World Almanac and Book of Facts: 1984 153 (Newspaper Enterprise, 1983); Hana Umlauf Lane, ed, The World Almanac and Book of Facts: 1986 156 (Newspaper Enterprise, 1985); Mark S. Hoffman, ed, The World Almanac and Book of Facts: 1989 199 (Newspaper Enterprise, 1988).

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What this ritual did, I suggest, is support the growing notion that there was a public safety dimension to the individual practice of smoking. Support, not entail: for even if I am correct about the association with cigarettes, it does not follow the same association carries over to radios, or walkmans, both banned during the same period. But however tenuous or marginal its effect, this was an effect brought about by a ritual--hence completing the catalog of techniques used to change the social meaning of smoking.

What the catalog of regulations here reveals, I suggest, is the broad extent to which the social meaning costs of smoking can be changed to change smoking behavior, just as the economic costs (understood more narrowly) can be changed to change smoking behavior as well. As with economic regulation, social meaning regulation no doubt has its limits. But as with economic regulation, it also has its effects.

V. Puzzles

After a scad of examples, I have identified in the above four techniques of social meaning regulation, and I have then applied these techniques to two problems in social regulation, the regulation of dangerous sex and smoking. My argument has been that an attention to social meaning is essential to the understanding, and regulation, of these two domains of social life, and essential elsewhere as well. Regulating social meaning is at the core of regulating these social problems.

Why isn't it troubling that in these areas, as well as in the others that I have sketched above, government might work to alter social meanings? If the orthodox and the heretical are constituted by social meanings, then regulating social meanings is the regulation of what is orthodox, and what is heretical. So why
[*1035] isn't it troubling that in these "matters of opinion" government might act to "prescribe" the orthodox? Why doesn't the same passion that animates Jackson's fixed star n312 seem at all in place when thinking about these other domains of orthodoxy?

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n312 See text accompanying notes 4-5.

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There is an odd, and less and less peaceful, coexistence, I suggest, between domains within which the regulation of social meaning seems perfectly fine, and domains within which its regulation seems to insult fundamental values--in particular, the First Amendment. It seems to insult fundamental values in a very small set of cases, First Amendment cases, where the government acts to prescribe social meaning by proscribing certain speech. The model is censorship. It seems perfectly fine in just about every other case. But why should censorship be the only antiorthodoxy concern? Why is it different in kind from all the other ways that the state may act to affect the orthodox?

The answer, I suggest, is a pattern familiar in constitutional law: Doctrine is developed to attack a particular threat to some constitutional value; the doctrine succeeds against that threat; but once that threat is past, the constitutional value becomes identified with the doctrine designed to protect it, and the value gets confused with the particular threat that the doctrine attacked. n313

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n313 A related point is made with respect to equal protection law by Reva Siegel. Compare Reva B. Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan L Rev 261 (1992).

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So has it been with First Amendment law too: For much of this century, the amendment was useless in repelling efforts by government to silence opposition, first in the World Wars, and later in the McCarthy period. n314 The modern view is a response to these censorships. Born in a series of dissents from the Court's refusal to protect the right of dissent, the modern view was finally

established in 1969, when, in Brandenburg v Ohio, n315 the Court embraced the Holmes-Brandeis vision of the First Amend- [*1036] ment: "that speech cannot be banned simply because it may be politically dangerous or politically convincing . . . ." n316 This was the great triumph in free speech history, when "liberal ideas and values eventually convince and win over the opponents of enlightenment and fairness." n317

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n314 The sins of the First World War were the Espionage Act of 1917, Act of June 15, 1917, ch 30, title I, section3, 40 Stat 219, and the Sedition Act of 1918, 40 Stat 553. During the War, there were some two thousand prosecutions under these acts. Geoffrey Stone, et al, Constitutional Law 1026 (Little, Brown, 2d ed 1991). After World War I, the terror shifted to the "Red Scare," with some two-thirds of states enacting laws prohibiting the advocacy of criminal anarchy, and laws prohibiting the display of a red flag with a seditious intent. Zechariah Chafee, Jr., Free Speech in the United States 141-68 (Harvard, 1941). In the 1950s, the battle shifted to the federal level, with laws directed against Communism directly. The Smith Act here was the primary weapon. See, for example, Dennis v United States, 341 US 494 (1951).

n315 395 US 444 (1969).

n316 Balkin, 1990 Duke L J at 393 (cited in note 12).

n317 Id.

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Since 1969, this triumph has eclipsed any other possible feature of Jackson's "fixed star." For it is as if this particular threat of government orthodoxy (censorship) is the only threat of government orthodoxy; that the rest in Jackson's rhetoric is just that. So focused have we been on the triumph in Brandenburg that we have lost sight of any broader value that the First Amendment might serve.

What the first four Parts to this Article should suggest, however, is that there may be reason to wonder about this limited view. In the face of the many techniques of social meaning regulation, one might ask why censorship has become the First Amendment's dominant concern. For these techniques should suggest at least that censorship is just one part of any power over orthodoxy.

The point is not that there is no sense to Jackson's "fixed star." Indeed, I think the principle (in some formulation) is fundamental to our constitutional tradition. The point is instead to find a way to translate Jackson's principle into a world within which a broader understanding of social meaning regulation is acknowledged. The principle cannot mean that government cannot modify what is orthodox; the principle must instead guide the places where the regulation of the orthodox is proper.

As I warned at the start, I do not intend here to make that translation. But there is value, I suggest, in ending this discussion first, by pointing to some of the presuppositions of the existing regime that may need rethinking, and second, by suggesting something about what has made this rethinking necessary.

A. The Marketplace Muddle

It is said that the First Amendment establishes a "free trade in ideas"; n318 that it is from this "marketplace of ideas" n319 that truth will win out; and that because of this competition, the best
[*1037] remedy for false speech is not prohibition, but rather more speech. n320

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n318 Abrams v United States, 250 US 616, 630 (1919) (Holmes dissenting).

n319 This phrase, and its differing implications, is first raised by Justice Brennan, in Lamont v Postmaster General, 381 US 301, 308 (1965) (Brennan concurring).

n320 See Stanley Ingber, The Marketplace of Ideas: A Legitimitizing Myth, 1984 Duke L J 1, 4-5.

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There are a number of ideas built into these slogans, each quite interesting from the perspective of social meaning. First, what is the picture of truth upon which each of these slogans hangs? True, no matter how often I say "2 + 2 = 5," two twos will be four. For such false claims, a perfectly adequate remedy is more speech, since those who track truth will be more successful than those who track falsity, and such success beats all.

But what about the following sort of "truth": "Women are inferior to men." This too is a falsity. But is it really the case that, like "2 + 2 = 5," no matter how many times this message is uttered, in whatever form, it will still be a falsity? Isn't it possible that such speech will have an effect on the reality that it describes, such that, even if first false, someday it may become true?

Where the market model makes most sense is where statements about X will not affect the truth of X. But even if this is so in many cases, what we have seen about social construction suggests that it is not so for all cases. That is, even if one thought that there were a reality (call it "nature" n321) that is in some sense independent of what we say about it, there is also a reality, a social reality, that is in an important sense constituted by what we say about it. "Nature" may be resilient to the falsities of man, but it is the falsities of man that make up society.

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n321 Again, a misleading term. The distinction I point to is best captured by John Searle in The Construction of Social Reality at 31-57 (cited in note 41). Here I mean just those aspects of social reality least open to construction--as in the laws of nature, or the facts of science. That is not to say that these are not open to construction, only that their constructions appear less plastic.

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How could this difference matter from a First Amendment perspective? The answer is not at all clear. In the first place, if the marketplace metaphor were fully embraced, then we might worry here (as antitrust law does in the real marketplace) about differences in market power. If truth is to the speech marketplace as price is to the real marketplace, then we might worry when institutions, whether government or private, exercise significant market power. For it is then that one would trust less the result of the market process, and then that one might wonder more about a possible corrective. This might, for example, suggest a greater anxiety about governmental speech. n322

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n322 Some of the best work on government speech is in Mark G. Yudof, When Government Speaks: Politics, Law, and Government Expression in America (California, 1983). Yudof 's account, however, does not attempt to distinguish these two kinds of government speech--what we could call speaking, and constructing. Again, there is a difference between the government as one voice in a debate, and the government indirectly structuring the debate so as to color its outcome. This is not to say that there is a simple way to draw this distinction, nor that I think I have a clearer account, but that his conclusions are contingent upon there being no distinction here to draw. See also Note, The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns, 93 Harv L Rev 535 (1980).

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The concern might be different, however, depending upon the kind of speech considered. Again, if there is a category called "nature" that is resilient to the falsities of man, that simply means that any errors produced in the speech market with respect to these will be corrected by an unyielding reality. Truth will win out because there will be a greater return from truth than falsity, or so the thought might go.

But as to other categories of speech, those unrelated to "nature," falsity may undermine the very possibility of self-correction. If the falsities go to the very status of participants in the market of speech itself, then their standing to challenge these falsities may be undermined by the falsity itself. Think again about the falsity about the equal status of women, and compare it to the argument about equal representation raised in Baker v Carr: n323 While in general a political system might be self-correcting because views not adequately respected will exert their force through the political system, some flaws in the system (for example, unequal representation) may undermine the very possibility of this self-correction.

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n323 369 US 186 (1962).

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It is from this perspective, then, that much of the conflict over hate speech and pornography has a special salience. For seen like this, the claim of those who would support speech regulation is fundamentally about equal

citizenship rather than the special truth of their claims. On analogy again with the market: the regulations they seek are not so much the fixing of certain prices, but the avoiding of a debasement of currency.

The point is not only that more speech might not actually lead to finding the truth. n324 It is both that the speech itself may constitute the truth, and that the speech itself may undermine the status of those who would assert a counter truth. Both complications make more complex this model of the market. And as
[*1039] with any effort at making more complex the market, both may suggest an increased scope for market-perfecting regulation.

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n324 See, for example, Ingber, 1984 Duke L J at 16-31 (cited in note 320); Edward Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L Rev 964, 974-78 (1978).

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B. Regulating Context versus Regulating Text

The complexity in the marketplace metaphor suggests a second blindness in the scope of the First Amendment's focus. As I have suggested, the core of First Amendment jurisprudence is the limitation on the government's attempt to proscribe certain speech. Simplified mercilessly, what the First Amendment does is to limit the cases under which the government may say what may not be said, or what must be said. That was the core of the holding in Hudnut--that because the "fixed star" of the First Amendment proscribed government's prescribing what shall be orthodox, Indianapolis could not prohibit pornographic speech.

But the proscription of speech is just one of many means to the establishment of orthodoxy--indeed, perhaps the least effective way. What the techniques of social meaning regulation reveal is that there are many ways for government to establish what is orthodox and what is heretical, speech proscription being just one. Yet for these other techniques, the First Amendment has nothing to say.

The point is well known, though I suggest the heuristic of social meaning construction may help make it more plain. One example should suffice. New York law prohibits "loitering . . . for the purpose of begging." n325 In 1992, the statute (as applied to the public streets) was struck down by Judge Sweet as a violation of the First Amendment. n326 The opinion was upheld by the Second Circuit one year later. n327 Said the court, "begging constitutes communicative activity," and since conducted "in a traditional public forum," it was entitled to First Amendment protection unless the regulation was "necessary to serve a compelling state interest," "narrowly tailored to achieve that" interest, or "could be characterized as a regulation of time, place and manner" in a content-neutral manner. n328 Finding that the statute did not meet these conditions, the court struck it down.

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